SUPREME COURT U.S.
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96 648 OCT 21 1996
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

EHREDT UNDERGROUND, INC.,

PETITIONER,

v.

COMMONWEALTH EDISON COMPANY,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL UNION NO. 196,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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145 pp

QUESTIONS PRESENTED

1. Did the Seventh Circuit Court of Appeals impermissibly extend the holding in Atlantic Richfield Co. v. USA Petroleum, 495 U.S. 328, 110 S.Ct. 1884 (1990) and ignore this Court's holding in Blue Shield of Virginia v. McCready, 47 U.S. 465, 102 S.Ct. 2540 (1982) by denying standing to the victim of a group boycott?

2. Did the Seventh Circuit Court of Appeals err in holding, as a matter of law, that per se and "naked restraint" boycott principles have no application to vertical conspiracies?

3. Did the Seventh Circuit Court of Appeals misread Brown v. National Football League, 116 S.Ct. 2116 (1996) to overrule, sub silentio, both United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965) and Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 95 S.Ct. 1830 (1975) rehearing denied 432 U.S. 884, 96 S.Ct. 156 and thereby shelter from antitrust liability a union/third party conspiracy to destroy marketplace competition?

4. Did the Seventh Circuit Court of Appeals err in concluding that the litmus test for labor exemption shelter from the antitrust laws is whether the conduct is violative of the National Labor Relations Act?

5. Did the Seventh Circuit Court of Appeals contravene the Seventh Amendment Right to Trial by Jury, by resolving conflicting evidence of economic theory and ignoring other material issues of disputed facts?

6. Did the Seventh Circuit Court of Appeals err by expanding the preemptive effect of the NLRA to matters neither arguably prohibited by nor protected by the Act in contravention of this Court's holdings in Belknap, Inc. v. Hale, 463 U.S. 491, 103 S.Ct. 3172 (1983) and International Assn. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923 (1958)?

7. Did the Seventh Circuit Court of Appeals err in dismissing, with prejudice, some common law claims for relief while declining to exercise supplemental jurisdiction on the balance of such claims?

PARTIES

All of the parties to this proceeding are named in the caption. The petitioner, Ehredt Underground, Inc. (Ehredt) was the plaintiff in the District Court and appellant in the Court of Appeals. The plaintiff is a corporation, but has no affiliates. IBEW Local 196 (Local 196) is an unincorporated labor organization and is affiliated with the International Brotherhood of Electrical Workers, AFL-CIO and with various locals of the International (International). Commonwealth Edison Company (Edison) is a publicly held corporation. Its affiliates are not known to petitioner.

TABLE OF CONTENTS

Page

Decisions Below 1

Jurisdiction Of This Court 1

Statutory And Constitutional Provisions 2

Statement Of The Case 2

Basis For Federal Jurisdiction 7

Argument 8

1. Summary Of Reasons For Granting Certiorari 8

2. Conflict Among The Circuits And The Continuing Vitality Of Klor's, Inc. Re Group Boycotts 9

3. Arco Expanded and McCready Ignored 15

4. Seventh Amendment Transgressed 18

5. Revisionist Interpretation Of The Implied Labor Immunity 20

6. Preemption And The Conflict With Belknap, Inc. And Gonzales 23

7. Scope Of Supplemental Jurisdiction 26

Conclusion 28

TABLE OF AUTHORITIES

CASES

Page

Adams v. Pan American World Airways, Inc.,
828 F.2d 24 (D.C. Cir. 1987) cert. denied
485 U.S. 934, 108 S. Ct. 1109 (1988)
and cert. denied 485 U.S. 961,
108 S.Ct. 1225 (1988) 16

Allen Bradley Co. v. Local Union No. 3,
325 U.S. 797, 65 S. Ct. 1533 (1945),
reh'g denied 326 U.S. 803,
66 S. Ct. 11 (1945) 22

Alvord-Polk, Inc. v. F. Schumacher & Co.,
37 F.3d 996 (3rd Cir. 1994)
cert. denied 115 S. Ct. 1691 (1995) 19

Atlantic Richfield Co. v USA Petroleum Co.,
495 U.S. 328, 110 S.Ct. 1884 (1990) 8, 15

Belknap, Inc. v. Hale,
463 U.S. 491, 103 S. Ct. 3172 (1983) 8, 23

Blue Shield of Virginia v McCready,
457 U.S. 465, 102 S. Ct. 2540 (1982) . . 8, 15, 16, 17

Brown v. National Football League,
116 S. Ct. 2116 (1996) 8, 20, 21

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477, 97 S. Ct. 690 (1977)
cert. denied 429 U.S. 1090,
97 S. Ct. 1099 (1977) 15, 16

Cargill, Inc. v. Monfort of Colorado, Inc.,
479 U.S. 104, 107 S. Ct. 484 (1986) 15

Cascade Cabinet Co. v. Western Cabinet
& Millwork, Inc., 710 F.2d 1366
(9th Cir. 1983) 12

Com-Tel, Inc. v. Dukane Corp.,
669 F.2d 404 (6th Cir. 1982) 12

Connell Const. Co., Inc. v. Plumbers &
Steamfitters Local Union No. 100,
421 U.S. 616, 95 S. Ct. 1830 (1975)
rehearing denied 432 U.S. 884, 96 S. Ct. 1569 (1976) 21, 22

Construction Aggregate Transport, Inc.
v. Florida Rock Industries, Inc.,
710 F.2d 752 (11th Cir. 1983) 12

Cordova v. Bache & Co.,
321 F. Supp. 600 (S.D. N.Y. 1970) 21

Discon, Inc. v. NYNEX Corp.,
93 F.3d 1055 (2nd. Cir. 1996) 11

F.T.C. V. Indiana Federation of Dentists,
476 U.S. 447, 106 S. Ct. 2009 (1986) 12, 14

Fineman v. Armstrong World Industries, Inc.,
980 F.2d 171 (3d Cir. 1992) cert. denied
507 U.S. 921, 113 S. Ct. 1285 (1993) 19

Flood v. Kuhn,
407 U.S. 258, 92 S. Ct. 2099 (1972) 10

Harold Friedman, Inc. v. Thorofare Markets, Inc.,
587 F.2d 127 (3rd Cir. 1978) 19

In re Coordinated Pretrial Proceedings in
Petroleum Products Antitrust Litigation,
906 F.2d 432 (9th Cir. 1990), cert. denied
500 U.S. 959, 111 S. Ct. 2274 (1991) 17

International Association of Machinists v. Gonzales,
356 U.S. 617, 78 S. Ct. 923 (1958) 8, 23

Joseph E. Seagrams & Sons v. Hawaiian Oke & Liquors, Ltd.,
416 F.2d 71 (9th Cir. 1969) cert. denied
396 U.S. 1062, 90 S. Ct. 752 (1970) 13

Klor's, Inc. v. Broadway-Hale Stores, Inc.,
359 U.S. 207, 79 S. Ct. 705 (1959) . . . 9, 12, 13, 14

Local 100 of United Association of Journeymen
and Apprentices v. Borden,
373 U.S. 690, 83 S. Ct. 1423 (1963), reh'g. denied
375 U.S. 872, 84 S. Ct. 28 (1963) overruled . . . 24, 25

Matsushita, Matsushita Electric Industrial Co. Ltd.
v. Zenith Radio Corp.,
475 U.S. 574, 106 S. Ct. 1348 (1986) 18

National Collegiate Athletic Association
v. University of Oklahoma,
468 U.S. 85, 104 S. Ct. 2948 (1984) 14

Northern Pacific Railway Co. v. U.S.,
356 U.S. 1, 78 S. Ct. 514 (1958) 11, 12

Reiter v. Sonotone Corp.,
442 U.S. 330, 99 S. Ct. 2326 (1979) 16

San Diego Building Trades Council v. Garmon,
358 U.S. 801, 79 S. Ct. 20 (1958) 23

Sears, Roebuck & Co. v. San Diego County
District Council of Carpenters,
436 U.S. 180, 98 S. Ct. 1745 (1978) 24

Sharp v. United Airlines Inc.,
967 F.2d 404 (10th Cir. 1992)
cert.denied, 506 U.S. 974, 113 S. Ct. 464 15

Sheet Metal Workers Intern. Association AFL-CIO
v. N.L.R.B., 293 F.2d 141 (D.C. Cir. 1961),
cert. denied 368 U.S. 896, 82 S. Ct. 172 (1961) 25

Standard Oil Co. of New Jersey v. U. S.,
221 U.S. 1, 31 S. Ct. 502 (1911) 10

Sun-Land Nurseries, Inc. v. Southern California
District Council of Laborers,
793 F.2d 1110 (9th Cir. 1986) cert. denied
479 U.S. 1090, 107 S. Ct. 1299 (1987) 20

Teamsters Locals 70 and 85,
136 N.L.R.B. 1086, 49 L.R.R.M. 1930 (1962) 25

United Mine Workers of America v. Pennington,
381 U.S. 657, 85 S. Ct. 1585 (1965) 9, 20, 21

United States v. Hilton Hotels Corp.,
467 F.2d 1000 (9th Cir. 1972) cert. denied
409 U.S. 1125, 93 S.Ct. 938 (1973) 13

STATUTES

15 U.S.C. § 1 2

15 U.S.C. § 15 . . . . . 2, 7

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1331 and 1337 7

28 U.S.C. § 1367 . . . . . 2, 7, 9

29 U.S.C. §§ 157-8 2

F.R.C.P. 12(b)(6) 26

F.R.C.P. 56 . . . . . 18, 26

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

Petitioner respectfully prays that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Seventh Circuit (Circuit Court).

DECISIONS BELOW

The Circuit Court's decision is published at 90 F.3d 238 (7th Cir. 1996), reproduced in the Appendix at pp. 1 - 8. The appeal to that court was taken from three District Court opinions and the resulting judgment. Two of the opinions are published at 830 F.Supp. 1083 (N.D. Ill. 1993), Appendix pp. 9 - 35; and 848 F.Supp. 797 (N.D. Ill. 1994), Appendix pp. 38 - 73. The third unpublished opinion appears at Appendix pp. 76 - 84.

JURISDICTION OF THIS COURT

The Circuit Court rendered its Decision on July 23, 1996. This Court has jurisdiction to review by certiorari the decision of the Circuit Court pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The constitutional and statutory provisions involved are: the Seventh Amendment to the Constitution, Appendix p. 89; Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157-8, Appendix pp. 94 - 105; Section 1 of the Sherman Act, 15 U.S.C. § 1, Appendix p. 89; Section 4 of the Clayton Act, 15 U.S.C. § 15, Appendix pp. 90 - 92; and 28 U.S.C. § 1367, Appendix pp. 92 - 94.

STATEMENT OF THE CASE

Factual Statement

Ehredt sought relief under Section 1 of the Sherman Act against all defendants; for common law interference by Local 196 in the agreement and prospective advantage between Edison and Ehredt; and for breach by Edison of the contract between Edison and Ehredt.

The case comes before this Court in the wake of an affirmed grant of summary judgment and of a 12(b)(6) motion.

The facts and inferences are summarized in a fashion favorable to Ehredt.

Edison is the sole provider of electrical services to residential users in Northern Illinois. Connection of residential utility services is performed by underground trenching and installation of related equipment (URD).

Edison entered into an agreement with Illinois Bell allocating geographic territories within which each would perform URD services for the other. Employees of Illinois Bell, represented by IBEW Local 336, performed the work allocated to them under the agreement. Until 1988 members of a different IBEW local performed these services directly for Edison.

In 1988 Edison elected to subcontract these services to third parties. The bid specifications dictated the labor relations to qualify, i.e. each must be signatory to a labor contract with "some union".

Ehredt qualified to perform this work. It executed a Prehire Agreement with IBEW Local 336. The terms and conditions of this Agreement were favorable to Ehredt and were approved by the International.

Ehredt and others, including Trench-It, were awarded work in districts of the Edison Northern Division. Subsequently Edison awarded its 1990 Crystal Lake District contract to the low bidder, Ehredt.

Previously, Trench-It learned of Ehredt's financially favorable labor contract. Given the economic differences, it did two things. First, it shored up its Edison relations by hiring Edison relatives; and second, it complained vociferously to its Union, Local 196, about its sister union's agreement with Ehredt. These complaints were unsuccessful.

However, the drum beat of voiced complaint and demand for action by Trench-it and its multi-employer association escalated with loss of the 1990 bid. The cudgel was taken up again by Local 196. After political infighting,

Local 336 was ousted from its representative capacity by its International, leaving Ehredt employees without representation and Ehredt nonunion. Continuation of this status violated the Edison/Ehredt "some union" agreement.

Edison required only slight prompting from Local 196 to cinch the noose. Bonds had been forged between Trench-it and Edison, through Trench-it hiring relatives of Edison and through "paying the piper".

Mistakenly Ehredt disclosed its bid strategy for the 1990 contract to Edison. Trench-It's bid came in just below the disclosed bid plan of Ehredt. Edison, forecasting that Trench-It would win the contest and hire away Ehredt employees, was frustrated when Ehredt dropped its price and won the bid. In retaliation, Edison promised to keep a close eye on Ehredt and to award the contract to Trench-it for any "wrong moves".

When Ehredt failed to make any wrong moves, Edison diverted work to Trench-It. Ehredt's refusal to play ball with Edison by paying "the piper" harmed it.

The coup de grace, loss of its relationship with Local 336, was announced in August. Ehredt sought a prehire replacement agreement with two other unions. Each would replicate the wage and fringe structure of Local 336. Edison, after review of confidential, internal union documents, vetoed affiliation with either union. This consigned Ehredt to a Hobson's choice, i.e. either lose the construction contract because it was non-union or embrace Local 196, and its ruinous labor contract.

Local 196 had a multi-employer agreement. That agreement's favored nations clause foreclosed third party employers from negotiating a more favorable arrangement. Privy to the immutable effect of this a clause, Ehredt was inveighed by Local 196 to execute the multi-employer agreement upon assurance it would obtain an equitable

adjustment to the Edison contract. Such an adjustment was essential, as the escalated labor cost would otherwise be ruinous. Armed with assurances from the Union and overtures of interest in renegotiation from Edison, Ehredt executed the Area Agreement. Once this was done, Edison stonewalled renegotiation of the agreement. Ehredt was forced to relinquish its contract with Edison. Delighted at this turn of events, Edison awarded Trench-It the agreement. Freed of its competitor, Trench-It billed and Edison paid at two and three times the contract rate for non-existent rock, etc. These costs are and were passed on to the consumer within the Edison monopolist enclave.

BASIS FOR FEDERAL JURISDICTION

The United States District Court had jurisdiction pursuant to 15 U.S.C. §15 and 28 U.S.C. §§1331 and 1337 and had supplemental jurisdiction pursuant to 28 U.S.C. §1367.

ARGUMENT

1. Summary Of Reasons For Granting Certiorari.

As will be explicated in further detail, there are substantial reasons for granting this petition. They include a conflict among the Circuits whether to characterize a vertical conspiracy to boycott under the rule of reason, "naked restraint" or per se tests; the extent to which Atlantic Richfield Co. v USA Petroleum Co., 495 U.S. 328, 110 S.Ct. 1884 (1990) displaces the private attorney general in the enforcement of the antitrust laws and, sub silentio, overrules Blue Shield of Virginia v McCready, 457 U.S. 465, 102 S.Ct. 2540 (1982); whether conduct not violative of the National Labor Relations Act is, ipso facto, sheltered from Sherman Act scrutiny; the extent to which a court may permissibly invade the traditional province of the jury to declare economic principles to be strictly issues of law; whether the lower court has ignored the fundamentals of preemption, as explained by this Court in Belknap, Inc. v. Hale, 463 U.S. 491, 103 S.Ct. 3172 (1983)

and International Ass'n. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923 (1958); whether the lower court misinterpreted this Court's decision in Brown v. National Football League, 116 S.Ct. 2116 (1996) and assumed this Court overruled Connell Const. Co. Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616; 95 S.Ct. 1830 (1975); rehearing denied 423 U.S. 884, 96 S.Ct. 156 (1975) and United Mine Workers of America v Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965); and finally, whether proper administration of 28 U.S.C. §1367 requires a bright line rule.

2. Conflict Among The Circuits And The Continuing Vitality Of Klor's, Inc. Re Group Boycotts.

The District Court held that the facts demonstrated merely a vertical boycott between Edison and Trench-It; that the rule of reason applied; and that petitioner had failed to demonstrate injury to competition under such rule. The Circuit Court adopted this analysis.

The seminal case is, of course, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959) where a minuscule retailer suffered a boycott at the hands of a direct competitor and its suppliers. While the complaint alleged a horizontal boycott, the holding governed a series of rimless wheel vertical conspiracies between Broadway Hale and each of its suppliers.

Eschewing the approach dictated by this Court in Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099 (1972), the Circuit Court set upon a course of judicial activism to reshape the contours of traditional antitrust dogma. The result will proliferate uncertainty within the business community by substituting the rule of reason for bright line litmus test resolution of boycott lawfulness. The lawfulness of conduct can no longer be judged by a snap shot or label but rather the retrospective analysis of disagreeing economists.

The language of the Sherman Act, if read literally, would interdict all restraints upon trade. It was softened,

judicially, to foreclose "unreasonable" restraints, Standard Oil Co. of New Jersey v. U. S., 221 U.S. 1, 31 S.Ct. 502 (1911), a proxy to the common law.[1] This decision set the Court upon an unacceptable ad hoc course of case-by-case analysis. This led to establishment of the per se test. As this Court explained:

> "This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries,in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken."[2]

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[1]The common law adopted the ancillary restraint doctrine to aid in ferreting out unreasonable conduct. Actual detrimental effects did not have to be demonstrated where the sole object of the conduct was restraint of a competitor. The actual reasonableness of the restraint was adjudicated only where the restraint was ancillary to some beneficial purpose.

[2]Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 5, 78 S.Ct. 514 (1958).

In Discon, Inc. v. NYNEX Corp., 93 F.3d 1055 (2nd Cir. 1996) the Second Circuit Court of Appeals held that the per se rule applies to vertical boycotts where the purpose is stifling merely one competitor.[3] This Court has not held, since Klor's, whether either the per se or "naked restraints test"[4] will continue to govern vertical boycotts which are unaided by any pro-competitive aspect.[5] [6]

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[3]Cited in support of this conclusion, in addition to Klor's, was Com-Tel, Inc. v. Dukane Corp., 669 F.2d 404 (6th Cir. 1982); and Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366 (9th Cir. 1983). Cited in opposition is Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752 (11th Cir. 1983).

[4]F.T.C. V. Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct. 2009 (1986).

[5]Ehredt contended that Edison was, in fact, an actual or potential competitor in the market for provision of URP because it directly engaged in that activity in some areas and further because, under its agreement with Illinois Bell, sold or traded such services commercially. In contravention of dicta within Discon it rejected this invitation.

[6]Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 5, 78 S.Ct. 514 (1958).

While danger always accompanies distilling immutable guiding principles from precedent, it does appear that there must be a confluence of two factors to satisfy a court that the per se rule ought to be applied. First, there should be a cumulative series of decisions decrying the specific restraint. This permits the court to discontinue weighing the purpose and effect of the practice. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959), Joseph E. Seagrams & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969) cert. denied 396 U.S. 1062, 90 S.Ct. 752 (1970).

Second, evolving out of the court's experience with prior cases is the inference that the sole or primary intent motivating the conduct is achievement of an anti-competitive effect. Where the defendant demonstrates that its primary purpose or its effect is promotive of competition, the per se label is not attached. This confluence of factors is present here. Cf. United States v. Hilton Hotels Corp., 467 F.2d 1000

(9th Cir. 1972) cert. denied 409 U.S. 1125, 93 S.Ct. 938 (1973).

Further, this Court has also adopted a short hand rule of reason test. This appears to be akin to "main" versus "ancillary" dichotomy of the common law. Section One of the Sherman Act does not act merely as a bulwark against mature, entrenched monopolists. It also seizes upon incipient behavior, seeking its early arrest. Thus proof of violation does not demand a gnat's eyebrow analysis of market power. A truncated approach suffices to interdict "naked restraints" on price or output. Where the challenged conduct effects price or output responsiveness to demand, no detailed market analysis is necessary. National Collegiate Athletic Ass'n. v. Univ of Oklahoma, 468 U.S. 85, 104 S.Ct. 2948, 2964-65 (1984).

The Circuit Court rejected application of both the per se test and the truncated "naked restraints" test. It ignored the fact that, as in Klor's v. Broadway Hale, a conspiracy existed to drive a cost efficient, consumer benefiting, force from the

market place. In doing so, it widened the gap among the fractured Circuit Courts upon application of the per se test; alternately it did violence to this Court's admonition in Indiana Federation and NCCA.

3. Arco Expanded And McCready Ignored.

The Circuit Court held that petitioner failed to prove it had suffered antitrust injury.[7] In reaching this conclusion, it impermissibly expanded this Court's holding in Atlantic Richfield Co. v. USA Petroleum Co., 459 U.S. 328, 110 S.Ct. 1884 (1990) and ignored the impact of Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540 (1982).

In Arco, this Court distinguished between violation of the Sherman Act and standing to obtain damage relief under Section 4 of the Clayton Act. Ibid. 1889. A plaintiff must establish the traditional elements of standing plus antitrust

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[7]Amazingly, the court reached this decision even though it was not raised as a defense by the respondents in their brief or argument to the court.

injury, i.e. injury attributable to an anti-competitive aspect of the challenged conduct or practice.[8]

Congress relied upon "private attorney generals" to supplement the scarce resources of the Justice Department in the enforcement of the Sherman Act. To promote such, this Court has acknowledged the broad remedial purposes of the Act and favored its liberal construction in favor of putative victims. Reiter v. Sonotone Corp., 442 U.S. 330, 337, 99 S.Ct. 2326 (1979). The error of the Circuit Court was to ignore the remedial policy of the Act; the facts of these Supreme Court decisions; and fail to apply the lesson of McCready, supra.

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[8]Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S.Ct. 484 (1986), Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697 (1977) cert. denied 429 U.S. 1090, 97 S.Ct. 1099 (1977). See also Sharp v. United Airlines Inc., 967 F.2d 404, 406-407 (10th Cir. 1992) cert. denied 506 U.S. 974, 113 S.Ct. 464, contra Adams v. Pan American World Airways, Inc., 828 F.2d 24 (D.C. Cir 1987) cert. denied 485 U.S. 934, 108 S.Ct. 1109 (1988) and cert. denied 485 U.S. 961, 108 S.Ct. 1225 (1988).

In Brunswick, the causally relevant harm to the plaintiff was the advent of vigorous competition; in Arco, a price fixing arrangement between third parties did not cause competitive injury to the plaintiff because the resulting price, absent predation, could benefit plaintiff and not harm the consumer; in Cargill plaintiff ruminated about the prospect of vigorous, non-predatory future price competition. None of these cases addressed the harm to the direct victim of a boycott.

In McCready the Court granted relief to an indirect victim of a conspiracy to boycott others. The Court acknowledged that the direct victim of a boycott is within the penumbra of the Clayton Act. The court further stated that the relationship between the claimed injury and that which made defendant's conduct unlawful is not the sin qua non to recovery, but merely a factor. Fn. 20, Ibid. 2550. The rule of McCready applies.

4. Seventh Amendment Transgressed.

The VII Amendment grants the right to trial by jury. Care must be exercised to avoid, in the zeal to dismiss complex antitrust cases, trampling upon this right. A court ought not to be converted "into a thirteenth juror who must be persuaded before an antitrust violation may be found."[9]

The Circuit Court violated these principles in two ways: First, it weighed its own views of economic fact and theory against the evidence introduced by Ehredt. Second, it rejected reasonable inferences of complicity by Local 196 in the boycott.

While petitioner primarily asserted that application of the per se or naked restraint rule trumped the need to establish injury to competition, it did not rest on this assertion. It also introduced substantial expert testimony, defining the relevant market and harm to the consumer. Neither defendant

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[9]In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 438-39 (9th Cir. 1990), cert. denied 500 U.S. 959, 111 S. Ct. 2274 (1991).

introduced any contrary expert evidence. The Court, applying its Chicago School brand of economic theory, gave no weight or credence to the contrary opinion evidence.

This approach, an apparent but unfortunate progeny of Matsushita[10], fairly raises the question of when and in what circumstances, faced with a FRCP 56 motion, a court may ignore expert opinion evidence.

The normative answer to this issue, consistent with the VII Amendment, must be limited to those circumstances where, as a matter of law, this evidence would make no difference in the outcome.

Secondly, there was the issue of whether Local 196 was a party to the conspiracy. The trial court said no, in categorical disagreement with the Magistrate.[11] This decision

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[10]Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986).

[11]"In light of that motive, the record gives rise to an unmistakable inference that these three entities combined their efforts to achieve that end." (Appendix to Seventh Circuit p. 226).

squarely conflicts with Fineman v. Armstrong World Industries, Inc., 980 F.2d 171 (3d Cir. 1992) cert. denied, 507 U.S. 921, 113 S.Ct. 1285 (1993) and Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 143, n. 64 (3rd Cir. 1978). A conspiracy may be shown between vertically aligned parties, even when their motive differs, providing the purpose is known and material aid in its accomplishment is afforded. Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996 (3rd Cir. 1994) cert. denied 115 S.Ct. 1691 (1995).

5. Revisionist Interpretation Of The Implied Labor Immunity.

In a remarkable tour de force, the Circuit Court held Brown v. National Football League determines the existence of an antitrust violation, not merely the scope of the labor exemption.[12]

The Circuit Court analysis is constructed upon flawed assumptions. First it equates compliance with the NLRA with

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[12]No party briefed or raised the issue of the exemption upon appeal.

a lack of antitrust exposure; second it assumes a concession that favored nations clauses and third party agreements are lawful; and third that Brown overrules Connell and Pennington.

The Ninth Circuit, aided by this Court's decisions in Connell and Pennington defuses the first assumption. In Sun-Land Nurseries, Inc. v. Southern California Dist. Council of Laborers, 793 F.2d 1110 (9th Cir. 1986) cert. denied 479 U.S. 1090, 107 S.Ct. 1299 (1987) the court held that a clause, lawful under the NLRA, did not lead to automatic exemption from antitrust liability.

The Circuit Court's second assumption is equally flawed. Petitioner contended that Edison violated the antitrust laws when, acting as a principal for its own work and as agent for Illinois Bell, it insisted upon and reached agreement with Ehredt that it would become party to a particular union's area agreement. Cordova v. Bache & Co., 321 F.Supp. 600, 606 (S.D. N.Y. 1970).

Finally, the Circuit Court's implicit assumption that Connell, supra, was overruled, suggests scrutiny by this Court. Facially Brown does not overrule Connell, indeed it extolled its logic. The narrow holding of Brown does not implicate Connell, i.e. that employer members of a multi-employer bargaining unit may collectively implement the terms of their last best offer upon their respective, represented employees. Nor does it deal with strangers to their bargaining unit, as both Connell and Pennington did. Employers may not use the union as their catspaw to eliminate competition in the marketplace by imposition of ruinous terms and conditions of employment.

In Connell a union picketed contractors to compel the contractors to subcontract work solely to subcontractor's signatory to the area labor contract. The court held the exemption did not apply because it restrained the business market in ways that would not follow naturally from elimination of competition over wages, hours and working conditions. The conduct involved here is not exempt because

what Local 196 did, in combination with Trench-It, i.e., rid itself of Local 336, was not a restraint naturally flowing from the elimination of competition over wages, hours and working conditions. This is the heart of Connell. This is where Connell differs.[13]

6. Preemption And The Conflict With Belknap, Inc. And Gonzalez.

The Circuit Court's affirmance of the District Court's preemption analysis creates a conflict with this Court's prior decisions in Belknap and Gonzales.

Ehredt was the target of concerted activities between Local 196 and its International, initiated by Trench-It, to deprive it of the fruits of its agreement with Edison. The wrongful motive was to destroy Ehredt's ability to perform its fixed cost contract with Edison. The means used were twofold: First, to cause the International to divest Local 336

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[13]See also Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 65 S.Ct. 1533 (1945), reh'g denied 326 U.S. 803, 66 S.Ct. 11 (1945).

of jurisdiction, and order it to disclaim representation of Ehredt employees. Second, to misrepresent to Ehredt it would cause Edison to amend the construction agreement to account for spiraled labor cost.

State courts are preempted from considering matters that are arguably prohibited or protected under the NLRA. San Diego Building Trades Council v. Garmon, 358 U.S. 801, 79 S.Ct. 20 (1958). Even when this predicate exists preemption will not apply if (a) the activity regulated is merely of peripheral concern under the Act; (b) the conduct touches deeply rooted local concerns; (c) there is a lack of identity of issues which could be presented to the NLRB, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197, 98 S.Ct. 1745 (1978); or (d) there is a lack of appropriate remedy.

Gonzales makes clear that the NLRA does not deal with intra-union matters. Such matters therefore may be resolved by state law. Local 196's argument that Local 100 of United

Ass'n. of Journeymen and Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423 (1963), reh'g. denied 375 U.S. 872, 84 S.Ct. 28 (1963) overruled Gonzales is wrong. Borden sought the use of state law to remedy his discriminatory referral from the union hiring hall. The Supreme Court held this allegation was of a type, even though internal, within the purview of the NLRB because it involved wages, hours and working conditions. The Borden court distinguishes Gonzales on the basis that it did not directly involve the employer/employee relation. 373 U.S. 690, 637. Here, as in Gonzales, the dispute was wholly intraunion, making the conduct not preempted. Teamsters Locals 70 and 85, 136 N.L.R.B. 1086, 49 L.R.R.M. 1930 (1962).

The lower court labored to ferret out a theory upon which the NLRB could fashion relief. It proclaimed an arguable violation of Section (8)(b)(4)(C). This section applies solely to coerced ouster of a "certified union". Local 336 was not certified. Loss of jurisdiction was strictly an intra-union

political maneuver. The (8)(b)(4)(C) rationale is wholly inapplicable. Sheet Metal Workers Intern. Ass'n. AFL-CIO v. N.L.R.B., 293 F.2d 141 (D.C. Cir. 1961), cert. denied 368 U.S. 896, 82 S.Ct. 172 (1961).

Nor is the second wrongful means of interference, false representation of its ability to cause Edison to amend the construction contract, preempted. Yes, a very attenuated argument could be made that fraudulent statement in negotiations is subject to NLRA scrutiny. However, as in Belknap such conduct is peripheral to the Act and of sufficient local concern to implicate federalism policies underscoring preemption.

7. Scope Of Supplemental Jurisdiction.

Ehredt alleged common law tort and contract claims for relief. The tort count was dismissed, under FRCP 12(b)(6), for failure to state a claim for relief. A portion of the Contract Count, breach of a covenant of good faith and fair dealing, was dismissed under FRCP 56, with the express breach remitted to

trial. On the eve of trial the court dismissed the federal predicate claim and then declined to exercise supplemental jurisdiction over the remnant contract claim.

The effect of this decision was to bifurcate a single claim for relief arising out of a common nucleus of facts, remitting petitioner to appeal of the dismissed claims to the Circuit Court and to the state court on the contract claim. The impact of this determination is to tax the resources of two court systems, let alone the precious resources of the parties.

The posture of this case calls for a bright line rule to be observed by all district courts. That rule would be: If a federal court declines to exercise supplemental jurisdiction, it must either vacate any predecessor dispositive ruling on state law claims; or retain and exercise jurisdiction to avoid piecemeal, separate court litigation over the same nucleus of facts.

CONCLUSION

It is respectfully submitted that this Court should grant a Writ of Certiorari to resolve the substantial issues raised by this petition.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT
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TABLE OF CONTENTS

Page No.

Seventh Circuit Court of Appeals
Decision of July 23, 1996 1

District Court Memorandum Opinion
And Order of July 16, 1993 9

District Court Order of July 22, 1993 36

District Court Memorandum Opinion
And Order of April 12, 1994 38

District Court Order of April 15, 1994 74

District Court Order of August 7, 1995 76

District Court Order of September 11, 1995 85

District Court Corrected Judgment In
A Civil Case dated August 21, 1995 87

Seventh Amendment To Constitution 89

15 U.S.C.A. § 1 89

15 U.S.C.A. § 15 90

28 U.S.C.A. § 1367 92

29 U.S.C.A. § 157 94

29 U.S.C.A. § 158 94

IN THE
UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 95-3244
EHREDT UNDERGROUND, INC.,

Plaintiff-Appellant,

v.

COMMONWEALTH EDISON COMPANY,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL UNION NO. 196 of that International Union,

Defendants-Appellees.

Appeal from the
United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 91 C 2361—**Richard A. Posner,** Judge.

Argued April 3, 1996—Decided July 23, 1996

Before BAUER, EASTERBROOK, and DIANE P. WOOD, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Until 1988 Commonwealth Edison Company dug all of its own trenches for electrical cables. To avoid labor trouble when it began subcontracting some of this work, Commonwealth Edison insisted that the contractors employ union members. Ehredt Underground, until then a non-union contractor, signed a collective bargaining agreement with Local 336 of the International Brotherhood of Electrical Workers (IBEW) in order to become eligible. Late in 1988 Ehredt bid against Trench-It, Inc., for work near Chicago. Ehredt's bid prevailed, because its labor costs were lower.

Trench-It set about to raise its rival's costs. In 1990 Trench-It persuaded the IBEW to rule that all cable laying near Chicago is in the jurisdiction of Local 196, which already represented Trench-It's employees and had made most-favored-nation promises. That is to say, Local 196 had promised employers that they would receive the benefits of any more favorable terms granted to other firms, a commitment that dissuaded Local 196 from making concessions. Local 336 informed Ehredt that their relations would end on October 31, 1990. Ehredt had to sign with another union if it wanted to keep Commonwealth Edison's business. Trench-It prevailed on Commonwealth Edison to insist that its trenching subcontractors use IBEW labor. We may assume that the employees who made this decision did not promote the interests of Commonwealth Edison's investors; Ehredt contends that money changed hands. (For current purposes we accept this assertion, though it had not been proved.) On November 19, 1990, the National Labor Relations Board conducted an election among Ehredt's employees. The two contestants were the Congress of Independent Unions (CIU) and Local 196 of the IBEW.

Ehredt told its employees that Commonwealth Edison would not use any firm whose employees were represented by the CIU; the employees voted for the IBEW, the Board certified the results, and Ehredt signed Local 196's area-wide collective bargaining agreement. Faced with higher labor costs, Ehredt sought concessions from Commonwealth Edison on work already under contract—work that was profitable with Local 336's hourly wages but unprofitable with Local 196's. Commonwealth Edison held Ehredt to the terms of the contract, which Ehredt then refused to perform. After Ehredt walked off the job on January 14, 1991, Commonwealth Edison gave the work to Trench-It. Ehredt has never worked for Commonwealth Edison again.

This suit under §1 of the Sherman Act, 15 U.S.C. §1, contends that Commonwealth Edison, Trench-It, the IBEW, and Local 196 entered into a conspiracy to restrain trade that is unlawful per se. Judge Alesia concluded that a per se approach is untenable. He dismissed some state-law theories but set the case for trial on Ehredt's fallback argument that Commonwealth Edison violated the antitrust laws under a Rule of Reason approach. The case was transferred for trial to Chief Judge Posner, sitting by designation. He took the case off the calendar and granted summary judgment for defendants, ruling that Ehredt could not show that Commonwealth Edison possessed power to raise prices in the market for trench digging in northern Illinois, given the ease of new entry and the ease with which existing firms may expand their output. Market power is an essential element of any antitrust case under the Rule of Reason, see *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 761 (7th Cir. 1996) (collecting authority), so inability to establish it ended the case.

Ehredt's appeal poses the question how a buyer of goods or services could be liable under the antitrust laws for paying more than the lowest achievable price. If General Motors decides to buy tires from Goodrich for more than Goodyear bids, this might injure both GM and Goodyear, but it would not injure the process of competition. See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) (Breyer, J.); *Stamatakis Industries, Inc. v. King*, 965 F.2d 469, 471-72 (7th Cir. 1992). GM must bear the higher price. A manufacturer is consumer's champion when it comes to buying inputs such as tires, or trenches—and even a utility can't always recover higher costs it incurs needlessly. *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 210-12 (1990). Over and over, we stress that antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business. E.g., *Israel Travel Advisory Services, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1256-57 (7th Cir. 1995); *Sanjuan v. American Board of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251-52 (7th Cir. 1994); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413-14 (7th Cir. 1989). To put this differently, it is hard to see how Ehredt suffered antitrust injury. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, (1977). It did not pay higher prices as a consumer, and it did not suffer from a monopsony. Although it alleges unlawful exclusion from a market, what "market" could that be, given that it remained free to sell to other buyers of trenching services, the clientele it had before Commonwealth Edison started subcontracting in 1988? It would not make sense to speak of "the market in trenches dug for Commonwealth Edison."

We think, however, that it is unnecessary to work out the antitrust implications of Commonwealth Edison's decisions, because they have none. To show why, we take up labor law, and will work back to antitrust. A buyer of construction services may insist that its contractors have labor agreements with an identified union, to reduce the potential for labor unrest. Indeed, the project's owner or general contractor may insist that subcontractors accede to a particular collective bargaining agreement that provides for wages higher than the subcontractor otherwise would pay. See 29 U.S.C. §158(e), (f); *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 230-32 (1993) *(Boston Harbor)*. Ehredt accordingly does not argue that Commonwealth Edison violated the National Labor Relations Act by doing business only with trenching subcontractors whose employees were represented by the IBEW. Nor could Ehredt claim successfully in this case that the IBEW's resolution of the jurisdictional dispute between Local 196 and Local 336 violated the NLRA, or that a most-favored-nation clause in a collective bargaining agreement is unlawful; these subjects are in the province of the NLRB. Finally, the election of Local 196 to represent Ehredt's workers was supervised by the NLRB, and Ehredt did not ask the Board to set aside the results; instead Ehredt promptly signed a collective bargaining with that union. From this everything else followed—for it was the most costly agreement with Local 196 that led to Ehredt's woes.

Judge Alesia properly held that Ehredt's state-law claims against the unions are preempted. For example, Ehredt wants damages from Local 196 and the IBEW on the ground that they interfered with its contract with Commonwealth Edison—not only by assigning the work to Local 196 but also, Ehredt insists, by falsely representing, as an inducement to sign Local 196's area-wide collective

bargaining agreement, that Commonwealth Edison would amend its contract to protect Ehredt's profits. These activities are in the domain of federal labor law, and state regulation is forbidden whether federal law arguably protects or arguably prohibits the conduct. E.g., *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). Costly collective bargaining agreements make many a contract unprofitable, and high wages have driven many an employer out of business. If this permitted the award of damages against unions under state law, the federal regulatory system would come unraveled. For the same reasons, the federal antitrust laws do not apply. Ehredt wants to use the Sherman Act in much the same way as it wants to use state tort law—as a source of compensation from employers and unions whose labor-law maneuvers have turned its books from black to red. That is not a function of the antitrust laws.

Brown v. Pro Football, Inc., 64 U.S.L.W. 4554, 4555 (U.S. June 20, 1996), explains that an "implicit ('nonstatutory') exemption [to the antitrust laws] interprets the labor statutes . . . as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict." At oral argument, counsel for Ehredt argued that the nonstatutory labor exemption is inapplicable because multiple employers collaborated to Ehredt's disadvantage. But we need not consider how *Brown* would apply to a conspiracy among unaffiliated employers, for Trench-It was a seller to, rather than a rival of, Commonwealth Edison. *Brown* held that an agreement among football clubs (an established multi-employer bargaining unit) to pay a particular salary to developmental squad players is outside the scope of the

antitrust laws. The Court observed that multi-employer bargaining is common and lawful. So, too, it is lawful for an owner or general contractor to establish conditions for the conduct of work, even if that involves coordination with other firms. *Boston Harbor* shows that the labor laws permit an owner to insist that multiple contractors adhere to a single representational system and wage rate for a construction project. The Court concluded in *Brown* that a general multiple-employer exception to the nonstatutory labor exemption would "require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed—the very result that the implicit labor exemptions seeks to avoid." 64 U.S.L.W. at 4556.

In order to adjudicate Ehredt's claim, we would have to do exactly what *Brown* says a court should not: scrutinize the labor relations of a firm and determine which steps were unreasonable. The final paragraph of *Brown* suggests that antitrust laws might be applicable if a labor-management impasse lasts so long that the collective bargaining process is essentially defunct, but that is hardly a description of our case, where the injury stemmed directly from a collective bargaining agreement. Moreover, Commonwealth Edison has not used unions to cartelize the electricity market; its market power *vis-à-vis* consumers is unaffected by the terms on which it hires trench diggers. Contrast *Connell Construction Co. v. Plumbers & Steamfitters Union,* 421 U.S. 616 (1975).

Ehredt could have protested to the National Labor Relations Board. Whether it had good grounds for complaint is a subject we need not consider. We are confident, however, that Ehredt's antitrust claim is a non-starter. Judge Posner properly dismissed, without prejudice,

the state-law claims that are not preempted, 28 U.S.C. §1367(c)(3), so the judgment is

AFFIRMED.

No. 95-3244

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

EHREDT UNDERGROUND, INC.,
Plaintiff,
v.
COMMONWEALTH EDISON COMPANY
and International Brotherhood of
Electrical
Workers, Local No. 196, Defendants.

No. 91 C 2361

United States District Court,
N.D. Illinois, E.D.

July 16, 1993.

MEMORANDUM OPINION AND ORDER

ALESIA, District Judge.

This matter is before the Court on the parties' objections to Magistrate Judge W. Thomas Rosemond's Report and Recommendation ("Report") on Defendant Local 196's Motion to Dismiss Counts II and III of Plaintiff's First Amended Complaint. Plaintiff Ehredt Underground, Inc. ("Ehredt") filed a four-count complaint against Commonwealth Edison Company ("Com Ed") and International Brotherhood Of Electrical Workers, AFL-CIO, Local No. 196 ("Local 196"). Count II is directed at both defendants and alleges that they engaged in unlawful combinations and conspiracies in restraint of trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Count III is directed solely at Local 196 and is a state law claim of tortious interference with the right of contract and prospective advantage. Magistrate Judge Rosemond recommended denying the defendant's motion to dismiss Count II and granting defendant's motion to dismiss

Count III. for the reasons stated below the Court accepts the recommendations of the Magistrate Judge and accordingly denies defendant's motion to dismiss Count II and grants defendant's motion to dismiss Count III.

I. FACTS [FN1]

> FN1. As the parties do not object to the factual allegations as set out in the Report, the Court restates them here as they appeared in the Report.

Plaintiff Ehredt is a corporation engaged in the business of underground excavation and installation of electrical cables. Ken Ehredt is its President.

Defendant Local 196 is a labor organization affiliated with the International Brotherhood of Electrical Workers, AFL-CIO ("the International"). Harold Eastwood and Dave Lindsey are business managers for Local 196.

Commonwealth Edison Co. ("Com Ed") and Illinois Bell Telephone Company ("Illinois Bell") divide responsibility for installation of electrical and telephone cable. Contractors laying cable for Com Ed also act as agents for Illinois Bell and lay telephone cables at the same site and at the same time. Geographic areas are divided and either Com Ed or Illinois Bell accepts sole responsibility for installation.

In 1988, a construction foreman for Com Ed invited Ehredt to submit a bid for a contract to install cables. Ken Ehredt was told that his company must be a union contractor if he wanted to submit a contract proposal and do business with Com Ed. Ehredt received a packet of materials from Com Ed describing the bid proposal procedure and outlining

the specifications of the project. Com Ed's bid proposal form requires bidding *1087 parties to identify the union with which the bidding party has a labor contract.

Ehredt began discussions with several unions and finally entered into a collective bargaining agreement with International Brotherhood of Electrical Workers, AFL-CIO, Local 336 ("Local 336"). Local 336 is a labor organization affiliated with the International and represents many employees working for Illinois Bell and various cable television companies doing trenching and excavation work. An agreement between Ehredt and Local 336 was approved by the International.

On October 14, 1988, Ehredt submitted a bid to Com Ed on an excavation project. Shortly thereafter, on October 17, Ken Ehredt had a conversation with the president of Com Ed's Northbrook-area, in-house union. The union president told Ehredt that Com Ed had an agreement with its union to sub-contract only with union subcontractors. Ehredt was awarded a contract with the agreement that Ehredt was to perform the work as a union contractor.

Beginning in November 1988, various representatives of Com Ed advised Ehredt that it should provide kickbacks for the award of work. Each and every time, plaintiff refused to do so. A Com Ed representative also told plaintiff that Trench-it had provided kickbacks to Com Ed supervisors. Trench-it is a union contractor in the excavation and cable installation industry and has a collective bargaining agreement with Local 196.

Sometime after Ehredt began working for Com Ed, Local 196 and the International began a campaign to pressure Ehredt to abandon Local 336 and sign a collective bargaining agreement with Local 196. Starting in late 1988,

Ehredt's workers began noticing that they were being followed from job site to job site.

In April 1989, the union campaign escalated to physical violence when Ehredt's manager, Terry Counley, and one other worker were excavating at a remote, Com Ed job site. While the other employee was away getting equipment, two individuals approached Counley. Plaintiff believes they traced the crews' activities through routing information improperly furnished by Com Ed. They asked to see Counley's union card, which he produced for them. After inspecting the card, the two men picked up some of Counley's equipment and dropped it in the trench. When Counley bend over to pick up the equipment, the two men began to beat Counley. They told Counley that is what he could expect if he ever worked at that site again. After leaving Counley lying in the trench, the two men released the brake on Ehredt's earth-moving equipment and departed.

Moments later Local 196's business agent, Dave Lindsey, arrived at the job site and questioned Counley about whether Ehredt's employees would switch from Local 336 to Local 196. Counley told Lindsey that he could not give him an answer and asked for Lindsey's card. Lindsey then handed him Harold Eastwood's business card. As noted above, Harold Eastwood was a business manager for Local 196.

On another occasion, Eastwood told Ken Ehredt and Counley that Ehredt's workers were in the wrong union and that they should switch to Local 196 because the work they were performing was within Local 196's jurisdiction. He said Local 196 was determined to get all the work it felt was within its jurisdiction. Eastwood told Ehredt that Local 196 had only one more contractor (Illinois Hydraulic) to get and then the union could claim all of Com Ed's excavation and

cable installation contractors as members. Eastwood also told Ehredt that there was a Com Ed Board member who assisted him in either getting rid of non-union excavation and cable installation contractors or in getting them into Local 196.

Throughout the contract period with Ehredt, Com Ed expressed its satisfaction with Ehredt's work. In fact, between October 1988 and March 1990, plaintiff's contract was extended three times by Com Ed. During this same period, Com Ed entered into an agreement with Trench-it to perform identical work in the same geographic area. The work was allocated by Com Ed between the contractors on a work order basis.

Meanwhile, Doug Hill, a supervisor in the underground construction department of Com Ed's Crystal Lake District, repeatedly *1088 threatened to terminate Ehredt and replace it with Trench-it. Hill and other Com Ed supervisors also repeatedly gave away plaintiff's contracted work to Trench-it. In addition, Hill often falsely blamed Ehredt for falling behind in its work and threatened to give the work to Trench-it.

On one occasion, plaintiff was blamed for misconduct attributable to Trench-it. When Hill discovered that a contractor had left open a television cable trench, Hill blamed Ehredt and threatened to terminate Ehredt's contract. Later, however, when Hill discovered that Trench-it was responsible, he took no action.

Ehredt believes that a Com Ed foreman, who assigned work, had a financial investment in excavating equipment used by Trench-it and assigned favored work to Trench-it to protect his investment. Also, Com Ed made

equipment and facilities available to Trench-it at very favorable terms which were not available to plaintiff.

In January 1990, Com Ed began to solicit bids for a second contract. In connection with this bid, Hill told Ehredt that once Trench-it won the contract, most of Ehredt's employees would probably quit to work for Trench-it. Since the contract has not yet been awarded, Ehredt understood this to mean that Trench-it would receive special consideration in the bidding process.

Ken Ehredt took his concern to Forrest Stahmer, Com Ed's Contract Coordinator. Stahmer assured Ehredt that the bidding procedure was kept as apolitical as possible and invited Ehredt to submit a bid on the contract. Prior to the award, another Com Ed representative contacted Ken Ehredt to request that he lower some of his contract prices. Since this was necessary to win the contract, Ehredt agreed to do so.

On March 23, 1990, Ehredt was awarded a second contract to perform work in the same territory--the Crystal Lake District--for a two-year period running from April 1, 1990 to March 31, 1992 with the understanding that the work would be performed as a union contractor. Approximately three days after the contract was awarded, Hill called Ehredt's manager, Terry Counley, into his office. Hill told Counley that he did not think Ehredt Underground could handle the work they had contracted to do and that he would keep an eye on them. Hill threatened that, if Ehredt did not meet his standards, he would pull them off the job and give the work to Trench-it.

Trench-it had bid unsuccessfully for the Crystal Lake District work. Plaintiff believes Trench-it was unhappy to have lost this work and attributed the loss to lesser wages

paid by plaintiff. Ehredt further believes that Trench-it communicated its concerns to Local 196 and to Com Ed. Subsequently, agents of Local 196 and laid-off employees of Trench-it communicated threats of property damage and other harm to plaintiff through various Com Ed supervisors.

In conjunction with Local 196's campaign to recruit Ehredt, Local 336 began a parallel campaign to oust Ehredt, presumably under pressure from the International. By letter dated July 17, 1990, Local 336's president and business manager, Albert Franzen, advised Ehredt that the work being performed by Ehredt's workers pursuant to the Com Ed contract was out of Local 336's jurisdiction, even though similar work was performed by employees of Illinois Bell who were represented by Local 336. Franzen recommended that Ehredt cease doing such work. Ehredt refused to breach its contract with Com Ed and Local 336 terminated its collective bargaining agreement with Ehredt on August 21, 1990.

Ehredt then began discussions with other unions to replace Local 336. Ehredt considered the Congress of Independent Unions ("CIU"). The CIU is a labor organization which is not affiliated with the AFL-CIO. The wage scale which would have been implemented under a collective bargaining agreement with the CIU was roughly comparable to the wages plaintiff paid under the Local 336 contract.

Ehredt informed James Harper, purchasing agent for Com Ed, that his company was being put out of Local 336. When Ehredt offered to work as a non-union contractor, Harper refused. Consequently, plaintiff told Harper he was going to negotiate a contract with the CIU. At first, Harper accepted the *1089 idea, however, he said he would have to clear it though [sic] the legal department. About three

weeks later, Harper replied that Com Ed refused to do business with any contractor whose employees were represented by a union that was not an AFL-CIO affiliate.

As a result of the conduct of Local 336 and the restrictions placed on Ehredt by its contract with Com Ed (to-wit, that the company must be an AFL-CIO affiliated union contractor), Ehredt was forced to seek another AFL-CIO union to represent its employees if it wanted to keep its contract with Com Ed. Consequently, Ehredt began discussions with several AFL-CIO affiliated unions, including Local 196, International Union of Operating Engineers Local 150, and IBEW Local 117. At one point Com Ed representative Hill told Ehredt, "We don't want 150. Why don't you go with 196 and make everybody happy?"

On September 26, 1990, the president of CIU filed a petition to represent Ehredt workers for purposes of collective bargaining. Consequently, the National Labor Relations Board ("NLRB") scheduled an election for Ehredt's employees on November 19, 1990. Approximately one week prior to the election, Local 196 redoubled its efforts to pressure Ehredt and its employees to join Local 196. Specifically, agents of Local 196 now attempted to get the local on the election ballot. Agents from the International contacted Ehredt's employees at their homes in an effort to rally enough employee support.

Having tried previously but failing to solicit support from Ehredt's employees, agents of Local 196 contacted Ken Ehredt and arranged a meeting with him on November 10, 1990. At that meeting, Ehredt was told that if Local 196 was given a collective bargaining agreement with Ehredt, the Local would assist in obtaining Com Ed's consent to the contract price changes which would be necessary given

Local 196's significantly higher wage structure. Ehredt was also promised that the union would allow him to continue running the company with his current employees as he had under Local 336. On the basis of these oral agreements, he agreed that he would not oppose Local 196's appearance on the NLRB election ballot and he so notified his employees.

On November 19, 1990, the employees of Ehredt elected Local 196 as their exclusive collective bargaining representative and the union later was certified as such by the NLRB. Ehredt signed a collective bargaining agreement with Local 196 on December 17, 1990. Ehredt had previously been shown the agreement during the November 10 meeting. Ehredt claims there was and could be no negotiation over terms. The agreement became effective January 1, 1991 and provided for a wage scale that was nearly ninety percent (90%) higher than wages under the agreement with Local 336.

As a result of the termination of the collective bargaining agreement with Local 336 and the new agreement with Local 196, plaintiff determined that an equitable adjustment in its contract with Com Ed was necessary. Plaintiff was led to believe by Com Ed and Local 196 that a contract adjustment would be made. Ehredt sent Com Ed a letter on November 9, 1990 to notify them that it needed to revise its contract rates because the original bid for the project was based on Local 336's lower wage structure.

Ken Ehredt requested a meeting to discuss the renegotiation of the contract. He was asked to send a new proposal in preparation for that meeting. On November 28, 1990, Ehredt and his accountant met with Com Ed's representatives. At the meeting, they were told that the revised proposal was generally acceptable except for

approximately eight items. Ehredt offered to cut the revised bid for those items by fifty percent (50%).

On December 13, 1990 (after Local 196 was certified as the collective bargaining union, but four days before an agreement was signed between Ehredt and Local 196), Com Ed advised Ehredt that his revised bid was rejected. Ehredt was further told that unless he cold stick to his original bid, he would lose the contract to Trench-it. On January 14, Com Ed terminated plaintiff's contract and awarded it to Trench-it. Trench-it hired eighty percent (80%) of plaintiff's employees--many of whom were ultimately replaced by children of Com Ed employees.

*1090 Plaintiff filed its original Complaint against Com Ed and Local 196 on April 19, 1991. Plaintiff subsequently filed an Amended Complaint ("the Complaint") on December 20, 1991. Plaintiff alleges that Local 196 and Com Ed (a non-labor party) engaged in a conspiracy to eliminate open-shop contracting. Plaintiff claims Local 196, Com Ed, Trench-it, the International, and Local 336 all conspired to eliminate open-shop contractors from performing trenching services in the relevant marketplace in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Plaintiff also asserts that Local 196's actions amount to tortious interference with contract and prospective advantage.

Defendant Local 196 moved to dismiss Counts II and III of Plaintiff's Amended Complaint. Local 196 contends it is entitled to the labor exemption to the antitrust laws and therefore Count II of the Complaint should be dismissed. Defendant also argues that Count III of the Complaint should be dismissed because this state law claim of tortious interference with the right of contract is preempted by federal labor law.

Magistrate Judge Rosemond recommended that defendant's motion to dismiss Count II be denied and the motion to dismiss Count III be granted. Defendant objects to the Magistrate Judge's recommendation to deny its motion to dismiss Count II, while Plaintiff objects to the Magistrate Judge's recommendation to dismiss Count III.

II. DISCUSSION

[1] A district court reviewing the Report and Recommendation of a Magistrate Judge makes a de novo determination of the record "of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions." FED.R.CIV.P. 72(b); 28 U.S.C. § 636(b)(1). Therefore, the court will review the objections of both parties and shall only dismiss a count for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The court accepts all well pleaded facts in the complaint as true and views allegations in a light most favorable to the plaintiff. Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987).

A. Count II--Antitrust Claims

[2] Defendant makes four objections to the Magistrate Judge's recommendation that defendant's motion to dismiss Count II be denied. First, the Defendant objects to the factual finding that agents of Local 196 engaged in physical violence or threats of physical violence against employees of plaintiff. Specifically, defendant argues the

Complaint alleges only that two unknown men beat plaintiff's employee and that "even the most generous reading of the Amended Complaint does not allege that the two unnamed persons were Agents of Local 196." (Defendant's Objections to the Magistrate Judge's Report, at p. 2). The court disagrees.

When deciding a motion to dismiss, the court should "take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the light most favorable to the plaintiffs." Ellsworth v. City of Racine, 774 F.2d 182, 184 (7th Cir. 1985). It is reasonable to conclude from the Complaint that the men who came to Ehredt's job site in April of 1989 and destroyed equipment and beat one of Ehredt's employees were acting as agents of Local 196.

Several allegations in the Complaint make this a reasonable inference. First, plaintiff alleges that two unknown men showed up at an Ehredt job site in April 1989. (Plaintiff's First Amended Complaint, at p. 14, ¶ 39). These men allegedly had traced Ehredt to this remote job site (this site was not visible to general traffic and was not a matter of public knowledge) through information improperly provided by Commonwealth Edison. Id. Once they arrived at the job site, they beat Terry Counley, an employee of Ehredt, and destroyed much of the equipment at the job site. Id. They told Counley that these attacks would continue if Ehredt worked in Gary, Illinois again. Id. Just moments after *1091 these men left, Dave Lindsey, the business agent for Local 196, arrived at the Ehredt job site to convince Counley and his employer Ehredt to switch from Local 336 to Local 196. Id.

The short period of time that passed between Lindsey's arrival at the job site and the attack by the two

unnamed men, combined with the ability of both Lindsey and the two unknown men to find plaintiff's worksite location, information that was not a matter of general knowledge and which allegedly was provided improperly by Com Ed, leads the court to the reasonable inference that the two unknown men were agents of defendant Local 196. Accordingly, the defendant's objection is overruled.

Defendant's second, third and fourth objections are made to the Magistrate Judge's legal conclusion that the defendants are not entitled to an exemption from the antitrust laws. Specifically, defendant Local 196 objects to the "legal conclusion that a conspiracy was properly pled, ... that the statutory exemption to Anti-Trust Law does not apply ... [and] [t]he legal conclusion that the non-statutory exemption [does] not apply." (Defendant's Objections to the Magistrate Judge's Report, at p. 1). The Court disagrees for the reasons that follow.

1. History of the Labor Exemption

[3] The labor exemption to the antitrust laws reflects the accommodation between the congressional policies favoring free competition in the marketplace as reflected by federal antitrust laws, and the labor policies favoring collective bargaining and other union activities reflected by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq. "[T]here is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment." H.A. Artists & Associates, Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 713, 101 S.Ct. 2102, 2108, 68 L.Ed.2d 558 (1981). The obvious tension between these two policies became apparent shortly after the passage of the first antitrust law in 1890.

Section 1 of the Sherman Act states "[e]very contract, combination ... or conspiracy in restraint of trade ... is illegal." 15 U.S.C. § 1 (1992). Immediately after its passage a sharp controversy arose as to whether this act applied to labor union activities, especially collective bargaining agreements. Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 801, 65 S.Ct. 1533, 1536, 89 L.Ed. 1939 (1945). Soon after the Sherman Act was passed, courts adopted the view that "a combination of laborers to obtain a raise in wages was itself a prohibited monopoly," and began to hold labor unions liable for violations of the antitrust laws. Id. at 802, 65 S.Ct. at 1536. Congress responded by passing sections 6 and 20 of the Clayton Act. With the passage of these provisions, "Congress sought to specifically exempt labor union activity" from antitrust liability. Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council, 675 F.2d 881, 884 (7th Cir. 1982). Section 6 states that "the labor of a human being is not a commodity or article of commerce ... nor shall such [labor] organizations, or the members thereof, be held ... to be illegal combinations or conspiracies in restraint of trade." 15 U.S.C. § 17 (1988). Section 20 limited the power of federal courts to issue injunctions in cases arising out of a labor "dispute concerning terms or conditions of employment" 29 U.S.C. § 52 (1988).

Sections 6 and 20 of the Clayton Act, however, failed to promote the national labor policies due to courts' continued application of the Sherman Act to union activities. Specifically, the courts defined a labor dispute very narrowly and limited the application of the Clayton Act to union activities directed at an employer by its own employees. See Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 47 S.Ct. 522, 71 L.Ed. 916 (1927); Duplex

Printing Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349 (1921).

Congress then enacted the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq., to expand the protection for labor unions from antitrust liability. The act prohibits injunctions against employees engaged in various *1092 activities during a labor dispute, even where a claim is made of an unlawful combination or conspiracy. "The Clayton and Norris-LaGuardia Acts combined to provide a comprehensive exemption from antitrust liability for union activity." Mid-America, 675 F.2d at 884. Even though the language of the Act does not explicitly exempt union activity from antitrust liability "it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." Id.

[4][5] Labor unions, however, do not have absolute immunity from liability under the antitrust laws; they remain accountable for certain anticompetitive activities. Two distinct exemptions to the antitrust laws exist. Mid-America, 675 F.2d at 884. The first is a statutory exemption based on various sections of the Clayton and Norris-LaGuardia Acts, and the second is a nonstatutory exemption based on an "accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622, 95 S.Ct. 1830, 1835, 44 L.Ed.2d 418 (1975).

We turn, therefore, to an examination of each of these exemptions to demonstrate that neither applies to activity allegedly engaged in by defendant Local 196.

(a) The Statutory Labor Exemption

The defendant objects to the Magistrate Judge's conclusion that the defendant, Local 196, is not entitled to the statutory exemption to the antitrust law. Because the Court finds that the Complaint adequately pleads conduct outside the statutory exemption we overrule the objections and adopt the findings of the Magistrate Judge.

[6][7] The Supreme Court, in United States v. Hutcheson, held that whether a labor union has violated the antitrust laws can be determined only by reading the Sherman Act, the Clayton Act and the Norris-LaGuardia Act together, "as a harmonizing text of outlawry of labor conduct." 312 U.S. 219, 231, 61 S.Ct. 463, 466, 85 L.Ed. 788 (1941). Pursuant to this reading the court announced a broad rule for what has come to be known as the statutory exemption to the antitrust laws.

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232, 61 S.Ct. at 466. So long as a union acts unilaterally and in its own interest, therefore, it will not be liable for resulting restraints on trade. Connell, 421 U.S. at 623, 95 S.Ct. at 1835. However, once a union conspires with employers to restrain trade, that union forfeits its statutory exemption because the purpose of the exemption is not to "immunize labor unions who aid and abet [businessmen] in violating the Sherman Act." Allen

Bradley, 325 U.S. at 810-11, 65 S.Ct. at 1540. Furthermore, a plaintiff's complaint alleges conduct outside this exemption where the complaint shows the union did not act in its own self-interest or when "a conspiracy between the union and a non-labor entity was properly pled." Mid-America, 675 F.2d at 886.

[8] Defendant Local 196 here contends that the Complaint is inadequate on two grounds. First, defendant argues that the Complaint fails to properly plead a conspiracy, and objects to the Magistrate Judge's finding that a conspiracy did exist. As to this objection, the court believes that plaintiff has alleged sufficient facts to show a conspiracy, and accordingly sustains the conclusions of the Magistrate Judge.

First, all the parties to this alleged conspiracy had a motive to force plaintiff out of the market. Trench-it was a competitor of the plaintiff, and had been losing Com Ed bids to Ehredt. (Plaintiff's First Amended Complaint, at p. 12, ¶ 33.) If the campaign to eliminate Ehredt from the marketplace was successful, Trench-it would receive more jobs.

Com Ed also had a financial interest in putting Ehredt out of business. When *1093 Trench-it received bids from Com Ed, it allegedly gave kickbacks to Com Ed employees. Id. at ¶ 34. Ehredt had refused to pay these kickbacks. Additionally, a Com Ed foreman had a financial investment in excavation equipment used by Trench-it. Id. at p. 10, ¶ 27. Ehredt's elimination from the marketplace served to protect his investment.

Similarly, Local 196 wanted to corner the market on Com Ed business in the far north region. They could only

do so by forcing Ehredt to adopt a collective bargaining agreement with 196 or force them out of business.

Furthermore, several facts show that the parties acted on their motivations and formed a conspiracy to eliminate Ehredt from the market place. When Ehredt first began to receive Com Ed jobs, Trench-it expressed concern to Local 196 and to Com Ed. It complained that Ehredt was able to bid lower because it paid their employees lower wages. Shortly after Trench-it spoke to Local 196, the union began to pressure Ehredt to abandon Local 336 and sign a collective bargaining agreement with Local 196.

During the campaign to force plaintiff to sign with Local 196, agents of the defendant union were able to follow plaintiff's employees from jobsite to jobsite. These men were apparently able to follow plaintiff only with the help of Com Ed. The location of these jobsites was available through a routing sheet prepared by Com Ed, which Com Ed allegedly improperly disclosed to the Union. Id. at p. 14, ¶ 39.

Plaintiff was also told by the business representative of Local 196 that "there was a Board member of Com Ed who assisted him in getting rid of non-union excavation and cable installation contractors or get them into Local 196." Id. at p. 15, ¶ 40. Laid-off employees of Trench-it and agents of Local 196 also allegedly communicated threats of property damage and other harm to the plaintiff through Com Ed supervisors.

Finally, plaintiff agreed to not oppose Local 196 as the collective bargaining agent of its employees. Plaintiff placed Local 196 on the ballot during elections. In exchange, Local 196 agreed to help Ehredt renegotiate its contract with Com Ed to compensate for the significantly

higher wage scale Local 196 would impose. Com Ed also led plaintiff to believe renegotiation was possible. However, once Local 196 was certified as the collective bargaining agent of Ehredt's employees, Com Ed refused to make any changes to the original contract price. The court believes these allegations suffice to show that plaintiff can prove a claim which would entitle it to relief based on a conspiracy between Local 196, Trench-it and Com Ed.

[9][10] Defendant also contends that it is entitled to the statutory exemption because the conduct in which it engaged was part of an organizing campaign and collective bargaining agreement. Defendant argues that no conspiracy exists because it was simply imposing its areawide wage scale. The court disagrees. While a union is free to unilaterally impose the same wage scale on every employer with whom it bargains, and it need not be concerned that the wages it is imposing will be too high for certain employers to pay, "the union loses the antitrust labor exemption ... when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." Mid-America, 675 F.2d at 887. However, when such a collective bargaining agreement is part of a conspiracy in restraint of trade, the plaintiff must show that the union conspired with a non-labor entity to impose the wage scale on the plaintiff; that the non-labor entity is in a position to directly benefit from the resulting restraint on trade; and that the union and non-labor groups share an anti-competitive purpose. Id. at 889.

Plaintiff's Amended Complaint has met these requirements. As was stated above, the Complaint contains sufficient factual allegations that Local 196, Trench-it and Com Ed conspired to force the plaintiff into a collective bargaining agreement with Local 196 at Local 196's standard wage scale. This coercion was designed to lock plaintiff into

a wage scale significantly higher than the wages plaintiff was paying at the time, and ultimately causing Ehredt to breach its contract *1094 with Com Ed due to an unplanned increase in employee wages. Local 196 benefited because they were able to take over all the Com Ed trenching and excavation business on the north side. Trench-it and employees of Com Ed both were in a position to benefit financially from Ehredt's elimination from the market place, as stated above. Finally, all three parties shared the anticompetitive purpose of eliminating Ehredt from the market place.

(b) The Non-Statutory Exemption

[11] The court also agrees with the Magistrate Judge's finding that Local 196's actions do not fall within the non-statutory exemption. In order to "accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act, 29 U.S.C. § 151 et seq., certain union-employer agreements [are] accorded a limited nonstatutory exemption from antitrust sanctions." Mackey v. National Football League, 543 F.2d 606, 611-12 (8th Cir. 1976). The non-statutory exemption is designed to allow unions and employers freedom in the collective bargaining process. The exemption applies to those terms or conditions of a collective bargaining agreement which are intended to eliminate competition over wages or working conditions, and only indirectly restrain trade in the business market. Connell, 421 U.S. at 623, 95 S.Ct. at 1835; Mid-America, 675 F.2d at 892. Those agreements that are intended to restrain competition in the business market are not exempt. Mid-America, 675 F.2d at 892.

[12] The non-statutory exemption was not intended to protect the type of conspiracy allegedly entered into by Local 196, Trench-it, and Com Ed. This exemption was designed to protect the parties to a collective bargaining agreement from antitrust liability when they bargain for terms or conditions which indirectly restrain trade. In the case at bar the parties to the collective bargaining agreement are not the same parties to the conspiracy. Rather, Local 196, Trench-it and Com Ed have allegedly acted in concert to force a collective bargaining agreement upon Ehredt so that it could not compete with Trench-it. Far from trying to impose a better wage sale, Local 196 has sought to directly restrain the business market by eliminating a participant. Therefore, they are not entitled to the non-statutory exemption.

Thus, plaintiff has properly pled the elements of an antitrust action. Based on the allegations in the Complaint, defendant is not entitled to either the statutory or non-statutory exemption to the antitrust laws. We therefore sustain the finding of the Magistrate Judge that Count II of Plaintiff's First Amended Complaint states a claim upon which relief can be granted. Defendant's motion to dismiss Count II is denied.

B. Count III--Preemption of State Claims

Count III of plaintiff's First Amended Complaint alleges that defendant Local 196, together with Local 336, the International and Trench-it, tortiously interfered with plaintiff's right of contract and prospective advantage. This claim is based upon state tort law. In his Report the Magistrate Judge concluded that this state law claim was preempted by federal labor law and recommended that the claim be dismissed. The court agrees with this conclusion.

[13][14] When a state law or remedy interferes with federal labor policy or specific provisions of the NLRA, any state claims brought pursuant to that state law are preempted. The leading case on federal preemption of state claims involving labor-management disputes is San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). In Garmon the court defined the situations when a state claim is preempted:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, ... [or] [w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board....

*1095 359 U.S. at 245, 79 S.Ct. at 780. The first question must therefore be whether the actions complained of are subject to Board regulation. United Ass'n of Journeyman & Apprentices v. Borden, 373 U.S. 690, 694, 83 S.Ct. 1423, 1426, 10 L.Ed.2d 638 (1963). If they are, then the state claim is preempted by federal labor law. Thus, we turn first to whether plaintiff's allegations are directed at conduct that is arguably prohibited by § 8 of the NLRA.

[15] In deciding whether the basis of a state law claim is arguably prohibited by the NLRA "[t]he critical inquiry ... is ... whether the controversy presented to the state court is identical to ... or different from ... that which could have been, but was not, presented to the Labor Board." Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197, 98 S.Ct. 1745, 1757, 56 L.Ed.2d 209 (1978). We think the allegations presented to this court in plaintiff's state tort claim are the same as an unfair labor practice claim brought pursuant to

§ 8(b)(4)(C) of the NLRA, 29 U.S.C. § 158(b)(4)(C). That section states that it is an unfair labor practice to:

> threaten, coerce, or restrain any person ... where ... an object thereof --
> (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

In comparison, a claim for tortious interference with contract and prospective economic advantage must establish:

> a valid business relationship (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. The interest protected is the reasonable expectation of economic advantage.

Rock Falls v. Chicago Title & Trust Co., 300 N.E.2d 331, 333, 13 Ill.App.3d 359, 363 (3d Dist. 1973); see also Heying v. Simonaitis, 81 Ill.Dec. 335, 339-40, 466 N.E.2d 1137, 1141-42, 126 Ill.App.3d 157, 162 (1st Dist. 1984).

Plaintiff, thus, must prove the same set of facts to recover under the federal and state claims. Recovery under plaintiff's state claim is premised upon a finding by this court that Local 196 intentionally interfered with plaintiff's contract with Com Ed and that such interference caused plaintiff to breach its contract. In this regard, plaintiff points to several factors to show interference. Plaintiff alleges defendant Local 196 engaged in a "heavy-handed

effort to convince the International president to force IBEW Local 336 to cancel Ehredt's contract with knowledge that Edison required Ehredt to be a union contractor and knowing that IBEW Local 196 was the only acceptable alternative union." (Plaintiff's Objection to the Magistrate Judge's Report, at p. 6). The essence of plaintiff's claim of interference is that Local 196 forced Ehredt, who already had a collective bargaining agreement with Local 336, to enter into a collective bargaining agreement with Local 196. The change from Local 336 to Local 196 resulted in a substantial increase in wages that plaintiff was unable to pay due to a previous contractual agreement with Com Ed. Plaintiff was thereby forced to breach its contract with Com Ed.

An unfair labor practice claim brought pursuant to § 8(b)(4)(C) would also inquire into whether Local 196 actually engaged in conduct that forced Ehredt to enter into a collective bargaining agreement with defendant, despite an already existing agreement with Local 336. Although Local 336 had refused to bargain with Ehredt before Ehredt had entered into a collective bargaining agreement with Local 196, the defendant had waged its campaign to organize Ehredt long before the collective bargaining agreement between plaintiff and Local 336 was terminated. This campaign began in the early part of 1988, and escalated to violence in April of 1989. (Plaintiff's First Amended Complaint, ¶¶ 38, 39.) Plaintiff's agreement with Local 336, however, was not terminated *1096 until October 31, 1990-- nearly two years after Local 196's coercive campaign had begun.

Under both federal labor and state tort law, it is essential for plaintiff to show that Local 196 improperly forced the termination of plaintiff's collective bargaining agreement with local 336 and forced plaintiff to sign an

agreement with local 196. Thus, the crucial issue to be litigated under either claim is the same. Therefore, jurisdiction must first lie with the NLRB.

Defendant's conduct is also arguably protected by § 7 of the NLRA. Defendant Local 196's actions were part of an organizing campaign. Organizing campaigns are protected activity under § 7. The NLRB could determine that the action defendant took did not amount to an unfair labor practice, but rather was part of a legitimate organizational campaign and as such is protected activity under § 7.

Plaintiff's state law claim is based on alleged conduct that is arguably concerted activity protected by § 7 and unfair labor practices prohibited by § 8. The proper tribunal to address these complaints is the National Labor Relations Board. Count III of plaintiff's Complaint is, therefore, preempted.

[16][17] Plaintiff argues that it should be allowed to pursue this claim here because the tort of interference with the right of contract expresses an overriding state interest. The Supreme Court has recognized that preemption may be inappropriate in cases involving conduct that "touche[s] interests so deeply rooted in local feeling and responsibility that ... [it] could not infer that Congress had deprived the States of the power to act." Garmon, 359 U.S. at 244, 79 S.Ct. at 779. However, these instances have been limited to cases involving "violence and imminent threats to the public order." Id. at 247, 79 S.Ct. at 781. No such issue is involved in plaintiff's Complaint.

Although the Complaint does allege that acts of violence were part of defendant's campaign to force Ehredt to switch local unions, they do not seek recovery for any

injuries or property damage as a result of those attacks. Rather, plaintiff's Complaint seeks compensation for economic loss caused by coercion into a collective bargaining agreement with Local 196. "The interest protected [by the tort of interference with the right of contract and prospective advantage] is the reasonable expectation of economic advantage." Rock Falls, 300 N.E.2d at 333, 13 Ill.App.3d at 363. The state does not have an overriding concern in regulating economic loss caused by labor disputes. Preemption is appropriate in this matter.

[18] Finally, plaintiff argues that its tort claim should not be preempted because it requests money damages for economic harm--a remedy the NLRB is unable to provide. On the contrary, however, the very fact that the remedies provided by the state and federal law are different demands, rather than prohibits, preemption. The conflict between state and federal law lies not only in the conduct to be regulated but also in the remedies provided. Garmon, 359 U.S. at 247, 79 S.Ct. at 781. Congress has already determined what it believes to be the appropriate remedy for defendant's conduct. The plaintiff may not circumvent that remedy by seeking adjudication of its claim under the guise of a state tort claim. [FN2] Plaintiff's Objection to the Magistrate Judge's recommendation to dismiss Count III is overruled and the conclusion of the Report is adopted.

FN2. It should also be noted that pursuant to 29 U.S.C. § 187 plaintiff may bring a claim for damages in the United States District Court against Local 196 for any violations of 29 U.S.C. § 158(b)(4) (1988).

III. CONCLUSION

For the reasons stated above, the findings of the Magistrate Judge's Report and Recommendation are accepted. The defendant's motion to dismiss Count II of Plaintiff's First Amended Complaint is denied. The Defendant's motion to dismiss Count III of Plaintiff's First Amended Complaint is granted.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Gerard C. Smetana
Law Offices of Gerard C. Smetana
333 West Wacker Drive
Suite 2860
Chicago, IL 60606-1227

DOCKETED
Jul 22 1993

Case Number:	1:91-cv-02361
Title:	Ehredt Underground I v. Commonwealth Edison
Assigned Judge:	Honorable James H. Alesia

MINUTE ORDER of 7/16/93 by Hon. James H. Alesia: Enter memorandum opinion and order. The parties' objections to Magistrate Judge Rosemond's Report and Recommendation ("R&R") recommending granting in part and denying in part defendant's motion to dismiss Counts II and III of plaintiff's First Amended Complain are overruled. The R&R is adopted in its entirety. Defendant's motion to dismiss is granted in part and denied in part. Cournt [sic] III of plaintiff's First Amended Complaint is dismissed [68-1].

This order was entered on the docket by the Clerk July 19, 1993

ATTENTION:

This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced

to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

END OF DOCUMENT

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
JAMES H. ALESIA
Case Number 91 C 2361
Date April 28, 1994
Case Title *Ehredt Underground, Inc. v. Commonwealth Edison, et al.*

Plaintiff's Motion for Clarification of the court's Minute Order dated April 12, 1994 is granted in part and denied in part. Defendant International Brotherhood of Electrical Workers, Local 196's Motion to Settle Order is granted. Defendant Local 196 is dismissed from this case. Plaintiff's Motion to Amend Order to Certify Pursuant to 28 U.S.C. § 1292(b) or In the Alternative to Enter Summary Judgment pursuant to FED. R. CIV. P. 54(b) is denied.

END OF DOCUMENT

EHREDT UNDERGROUND, INC.,
Plaintiff
v.
COMMONWEALTH EDISON COMPANY
and International Brotherhood of Electrical Workers, Local No. 196, Defendants

No. 91 C 2361.

United States District Court,
N.D. Illinois, E.D.

April 12, 1994.

MEMORANDUM OPINION AND ORDER

ALESIA, District Judge.

This matter is before the court on the parties' objections to Magistrate Judge W. Thomas Rosemond's Report and Recommendation ("Report") on the motion by defendant Commonwealth Edison Company ("Edison") for summary judgment on Counts I, II, and IV of Plaintiff's First Amended Verified Complaint (the "Complaint"). [FN1] Magistrate Judge Rosemond recommended granting defendant's motion for summary judgment on Count I, denying defendant's motion as Count II, and granting summary judgment in part and denying it in part as to Count IV. For the reasons discussed below, the Court accepts the conclusions of the Report with respect to Count I and Count II. The Court sustains plaintiff's objections regarding its first claim under Count IV, and overrules plaintiff's objections to the Report as to the second claim under Count IV.

FN1. This court previously granted defendant Local 196's motion to dismiss Count III. Ehredt Underground, Inc. v. Commonwealth Edison Co., 830 F.Supp. 1083 (N.D. Ill. 1993).

I. FACTS

A. Edison and URD Work

Plaintiff Ehredt Underground, Inc. ("Ehredt") is an Illinois corporation engaged in the business of underground excavation. Kenneth Ehredt is the corporation's president, manager and sole shareholder.

Edison is a public utility which provides electricity to approximately the northern one-third of Illinois. Under a contract entitled the General Joint Agreement ("GJA"), Edison and Illinois Bell Co. ("Illinois Bell"), a public utility responsible for providing local telephone service within Illinois, divide responsibility for installation of electrical and telephone cable. Geographic areas are divided up under the GJA, with either Edison or Illinois Bell accepting sole responsibility for installing both companies' equipment in the assigned area. The GJA provides that contractors laying cable for Edison also act as agents for Illinois Bell and lay telephone cable at the same time.

As part of the GJA, Edison is responsible for completing underground residential distribution work ("URD"), which includes digging, trenching for ground cable, installing various equipment, and connecting cable. Although Edison's own employees traditionally had performed URD work, in 1988 Edison management decided to hire outside contractors to perform some URD construction work in several of Edison's northern Illinois districts. In response to a request by officers from unions

representing Edison employees, Edison agreed that it would contract out URD work only to companies whose employees were represented by unions.

*801 In late 1988, an Edison construction foreman invited Ehredt and several other contractors, including Trench-It, Inc. ("Trench-It") to perform URD on a purchase-order basis. Ehredt and the other contractors began performing work for Edison in the North Shore and Crystal Lake Districts of Edison's northern division. At this time, Ehredt did not employ union labor. At some point in late 1988, however, Ken Ehredt was informed that its employees should be represented by a union in order to work for Edison.

Starting in November 1988, Ehredt asserts that certain Edison representatives informed Ehredt that it should provide kickbacks for the award of URD work. Ehredt refused these requests, although an Edison representative had related to Ehredt that Trench-It provided kickbacks to Edison supervisors.

In early 1989, Edison invited Ehredt, Trench-It, and several other contractors to submit bids for a contract to perform URD work. After the lowest bidder declined the contract, Edison awarded both Ehredt and Trench-It contracts to perform URD work. Both Ehredt and Trench-It performed contractor URD work in the Crystal Lake District during 1989 and 1990. Ehredt's 1989 Crystal Lake URD contract originally was set to expire October 31, 1989, but the contract was extended twice by the consent of all parties.

B. The Union Requirement

Although Ehredt's employees were not represented by a union at the time Edison originally solicited Ehredt for a bid, Edison's bid proposal form requires bidding parties to identify the union with which the bidding party has a labor contract. Shortly after Ehredt submitted his bid, therefore, he began discussions with several unions. Ehredt eventually negotiated a two-year collective bargaining agreement with International Brotherhood of Electrical Workers, ("IBEW"), AFL-CIO, Local 336 ("Local 336"). The International approved the agreement on March 19, 1989.

Soon after the agreement was executed, certain parties began questioning Local 336's jurisdiction over Ehredt's employees. First, Daniel Rosenmayer, president of Trench-It, complained to Harold Eastwood, business manager of Local 196, that Local 336 was representing employees in Local 196's jurisdiction. On May 9, 1989, James Conway, the International Vice President of the IBEW for the Sixth District, notified Thomas Beagley of Local 336 that Local 336 was not chartered for the type of work being performed by Ehredt employees. Conway stated that Local 196 was an IBEW-authorized union chartered for the work performed by Ehredt employees and, accordingly, Local 336 must terminate its collective bargaining agreement with Ehredt.

In response, Local 336 appealed Conway's decision to the International President of the IBEW, who has the sole authority to determine all jurisdictional disputes. The International President reversed Conway's decision, stating that the agreement between Local 336 and Ehredt Underground was valid. In November 1989, Conway again disputed the jurisdiction of Local 336 over Ehredt's

employees, and in late November, the International President again stated that the agreement was valid.

Far from accepting the International President's decision, the opposition to Ehredt's Local 336 affiliation subsequently intensified its pressure on the International President to force Ehredt to switch unions. In January 1990 Harold Eastwood of Local 196 joined the battle and complained to the International President that Local 196 had jurisdiction over Ehredt employees. In January and March 1990, Conway sent two more letters to the International President. Finally, on March 13, 1990, the International President reversed his prior position and informed Local 336 that Local 196 had jurisdiction over Ehredt employees and Local 336 should not enter into further collective bargaining agreements with Ehredt. On July 17, 1990, the president of Local 336 notified Ehredt that the setting of pad transformers, pedestals, and switching gear for Edison was beyond the scope of the collective bargaining agreement between Ehredt and Local 336, because the existing agreement covered only trenching and cable laying. As such, Local 336 stated to Ehredt that it would not renew *803 its collective bargaining agreement with Ehredt following its expiration on October 31, 1990.

C. The Rest of the Story

Although the above facts relate a fairly orderly though vigorous campaign to force Ehredt employees to affiliate with Local 196, Ehredt asserts a more sinister side to the crusade. Ehredt maintains that in late 1988, his workers noticed that they were being followed from job site to job site. In April 1989 two Ehredt employees were attacked at a remote location while working on an Edison project. The two attackers first approached Ehredt manager Terry Cournley while the other employee was away. The

attackers asked to see Counley's union card, which he produced for them. After examining the card, the two men picked up some of Counley's equipment and dropped it in the trench. When Counley bent over to retrieve the equipment, the two men beat Counley. The attackers told Counley that "that's what he could expect if he ever worked in Gary, Illinois again." After the releasing the brake on Ehredt's earth-moving equipment, the men departed.

Moments later, Local 196's business agent, Dave Lindsey, arrived at the job site and questioned Counley about switching from Local 336 to Local 196. Counley told Lindsey that he could not give him an answer and asked for Lindsey's card. Lindsey handed him Harold Eastwood' business card. Harold Eastwood was a business manager for Local 196 and participated in the dispute involving Local 336's jurisdiction over Ehredt employees.

On one occasion, Ehredt claims that Eastwood himself related to Counley and Ehredt that Ehredt's workers were in the wrong union, and that Local 196 was determined to obtain all work that it believe was within its jurisdiction. Eastwood stated that an Edison Board member was assisting him in getting rid of non-union excavation and cable installation contractors or getting them into Local 196.

Ehredt also alleges that he faced opposition on the job from Edison supervisors, despite Edison's overall satisfaction with Ehredt's work. As noted above, Edison extended Ehredt's contract twice between October 1988 and March 1990. Nevertheless, Douglas Hill, the supervisor in the underground construction department of Edison's Crystal Lake District, repeatedly threatened to terminate Ehredt and replace it with Trench-It. Ehredt asserts that Hill and other Edison employees consistently gave work to Trench-It that had been contracted to Ehredt. In addition, Hill often

falsely blamed Ehredt for falling behind in its work and threatened to give the work to Trench-It.

D. The 1990 Crystal Lake District Contract

In January 1990, Edison began to solicit bids for a second contract. Prior to his bid submission, Ken Ehredt spoke with Douglas Hill, the Edison supervisor, about his bid strategy, stating that he would likely increase his bid by twenty-five (25) percent from the preceding contract. In a later conversation, Hill told Ehredt that once Trench-It won the contract, most of Ehredt's employees would probably quit and go to work for Trench-It. Ehredt was alarmed at the implications of the statement. Not only was Hill aware of Ehredt's bid strategy, but also Hill's statement implied to Ehredt that Edison would give Trench-It special consideration in the bidding process for the as-yet unawarded contract. Ken Ehredt went to Forrest Stahmer, Edison's Contract Coordinator, to express concerns about possible favoritism. Stahmer assured Ehredt that the bidding procedure was kept as apolitical as possible.

Ehredt's fears were confirmed when Trench-It's bid for the contract came in just below the figure Ehredt had disclosed to Hill. Ehredt, however, had not followed his original strategy; upon the request of an Edison employee, he had lowered rather than raised his contract price. Ultimately, on March 23, 1990, Edison awarded Ehredt a two-year contract for the Crystal Lake District, with the understanding that Ehredt would perform the work as a union contractor. Edison awarded Trench-It the backup 1990 Crystal Lake District URD contract.

*803 Approximately three days after the contract was awarded, Hill called Ehredt's manager, Terry Counley, into his office. Hill told Counley that he did not think

Ehredt could handle the work they had contracted to do and that he would "keep a close eye" on them. Further, Hill threatened to pull Ehredt off the job and give the work to Trench-It if Ehredt made "any wrong move." Ehredt asserts that although it make no "wrong moves," Hill began giving Crystal Lake work to Trench-It. Counley testified that on several occasions he arrived at the worksite only to find that the work had been done and, on one occasion, Counley arrived as Trench-It workers were completing the work.

At a January 2, 1991 meeting between Kenneth Ehredt and Terry Counley of Ehredt Underground and Janet Rudolph and George Adamaitis of Edison's purchasing department, Ken Ehredt complained to Rudolph about the work diverted to Trench-It. Rudolph assured Ehredt that Edison would stand by its contract and pay Ehredt for all excavation work performed in the Crystal Lake District if Douglas Hill gave the work away in violation of the contract. As yet, Edison apparently has not deemed any work done by Trench-It as violative of the Crystal Lake District contract because Edison has not paid Ehredt for any diverted work.

E. Finding a New Union

Anticipating the expiration of its affiliation with Local 336, Ehredt contacted the Congress of Independent Unions ("CIU") in late July or early August 1990 about possible union representation. The CIU is a labor organization which is not affiliated with the AFL-CIO and is not organized by craft lines or geographic areas. The wage scale that would have been implemented under CIU representation was roughly comparable to the wages Ehredt paid under the Local 336 agreement.

Ken Ehredt notified James Harper, purchasing agent for Edison, that the CIU was under consideration as a possible replacement for Local 336. Harper referred the question of CIU representation to Daniel Shamblin of Edison's legal department. Three weeks later, Shamblin notified Harper that contractors should not affiliate with any unions not affiliated with the AFL-CIO because Edison's own unions would not look favorably upon such an affiliation. Harper relayed this information to Ehredt.

Because of the new requirement of AFL-CIO affiliation, Ehredt began discussions with various AFL-CIO unions, including Local 150. Despite Local 150's AFL-CIO membership, Edison representatives Douglas Hill and James Harper related to Ehredt that Local 150 was not acceptable. Specifically, Hill told Ken Ehredt, "We don't want 150. Why don't you go with 196 and make everybody happy?"

Subsequently, in October 1990, Local 196 filed an intervenor petition with the National Labor Relations Board ("NLRB"), which scheduled an election for November 19, 1990. Local 196 now stepped up its efforts to pressure Ehredt and its employees to join Local 196. Agents from the International contacted Ehredt's employees at their homes in an effort to rally enough employee support. Agents of Local 196 assured Ken Ehredt that if Local 196 was given a collective bargaining agreement with Ehredt, the Local would assist in obtaining Edison's consent to price changes which would be necessitated under Local 196's higher price structure. Ehredt was also promised that Local 196 would permit him to continue running the company as he had under Local 336. On the basis of these oral agreements, Ehredt agreed not to oppose Local 196's appearance on the NLRB election, and he informed his employees of this fact.

Local 196 won the election unanimously, and on December 17, 1990, it executed a collective bargaining agreement with Ehredt. Ehredt claims that no negotiation over terms of the agreement was possible. The agreement provided for a wage scale that was nearly ninety (90) percent higher than the scale implemented under the agreement with Local 336.

Ehredt's 1990 Crystal Lake District contract was predicated on Local 336's wage structure, and Ehredt found that an adjustment in its contract was needed as a result of the new agreement with Local 196. Ehredt *804 requested a renegotiation of the contract. In early January, Janet Rudolph refused to renegotiate the contract and told Ehredt that unless he could adhere to his original bid, he would lose the contract. On January 14, 1991, Ehredt informed Janet Rudolph that he would not continue performing work under the terms of the 1990 Crystal Lake District URD contract, and that he was pulling his employees off the job. Ehredt performed no work for Edison after that date. Edison subsequently awarded the contract to Trench-It, and Trench-It hired eighty (80) percent of Ehredt's employees.

F. Ehredt's Complaint and the Magistrate Judge's Report

In Counts I and II, Ehredt claims that Edison conspired to restrain trade in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. In Count I, Ehredt alleges that Edison conspired with Illinois Bell to compel Ehredt to execute a collective bargaining agreement with Local 196. Ehredt asserts that this conspiracy had the effect of eliminating competitive bidding in the Crystal Lake District and raising the costs to consumers of electrical and telephone services. In Count II, Ehredt claims that Edison, Local 196, Local 336, the International, and Trench-It

conspired to force Ehredt into executing a collective bargaining agreement containing ruinous economic terms, with the effect that Ehredt would be forced out of business and competition eliminated in the relevant market.

In Count IV, Ehredt alleges that Edison, through Douglas Hill, breached its contract with Ehredt under two theories. First, Ehredt claims damages through Hill's diversion to Trench-It of work which was originally assigned to Ehredt. Second, Ehredt asserts that Edison breached the covenant of good faith and fair dealing by rejecting the CIU as an acceptable union and by refusing to renegotiate its contract after implementing the collective bargaining agreement with Local 196.

The Magistrate Judge recommended that defendant's motion for summary judgment be granted as to Count 1, denied as to Count II, and granted in part and denied in part as to Count IV. Plaintiff objects to the Magistrate Judge's recommendation to grant summary judgment on Count I and to grant summary judgment in part on Count IV. Defendant objects to the Magistrate Judge's recommendation to deny summary judgment as to Count II and as to part of Count IV.

II. DISCUSSION

A. Standard of Review

1. Summary Judgment

[1][2] Summary judgment is proper when the record shows that no genuine issue of material fact exists and the moving party must prevail as a matter of law. FED.R.CIV.P. 56(c); Wigod v. Chicago Mercantile Exchange, 981 F.2d 1510, 1514 (7th Cir. 1992). In ruling,

the court considers whether any rational trier of fact could find for the non-moving party. Wigod, 981 F2d at 1514. Although the general rule is that a court must draw all inferences in favor of the nonmoving party, Eastman Kodak Co. v. Image Technical Services, Inc., ___ U.S. ___, ___, 112 S.Ct. 2072, 2077, 119 L.Ed.2d 65 (1992), "antitrust law limits the extent to which permissible inferences from ambiguous evidence may be drawn." Wigod, 981 F.2d at 1514 (citing Valley Liquors Inc. v. Renfield Importers, Ltd, 822 F.2d 656 (7th Cir. 1987).

2. Magistrate Judge's Report and Recommendation

A district court must make a de novo determination of any portion of the Report to which specific written objection has been made. The district judge "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions." FED.R.CIV.P. 72(b); 28 U.S.C. § 636(b)(1). Therefore, this court will address both parties' objections and, applying the appropriate standard for summary judgment, make a de novo determination as to each objection.

B. The Antitrust Claims

In Count I, Ehredt alleges that Edison and Illinois Bell conspired in restraint of trade to *805 require their contractors to use union labor. The Magistrate Judge recommended granting summary judgment. Ehredt makes two objections to the Magistrate Judge's recommendation. First, Ehredt objects to the Magistrate Judge's conclusion that Illinois Bell did not conspire with Edison. Ehredt maintains that by signing the CJA, Illinois Bell relinquished the right to make labor decisions in areas assigned to Edison

under the GJA. Ehredt states that "a requirement by Edison that subcontractors be union becomes the agreement of its principal, Illinois Bell. This creates the necessary plurality of acts and agreement necessary under Section One of the Sherman Act." Plaintiff's Memorandum in Support of Objections, at p. 4. Second, Ehredt objects that the agreement between Edison and Ehredt violates Section One. This court disagrees with Ehredt's contentions for the reasons that follows:

1. Liability Under Section One

[3][4] Section One of the Sherman Antitrust Act states that "[e]very contract, combination ... or conspiracy in restraint of trade or commerce ... is ... illegal." 15 U.S.C. § 1. The Supreme Court has held that on a motion for summary judgment an antitrust plaintiff alleging an agreement in restrain of trade must produce evidence sufficient to carry its burden of showing that the illegal arrangement existed. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763, 104 S.Ct. 1464, 1470, 79 L.Ed.2d 775 (1984). To meet this burden, a plaintiff must show by direct or circumstantial evidence "a conscious commitment to a common scheme designed to achieve an unlawful objective." Id. at 768, 204 S.Ct. at 1472. In regard to the motion for summary judgment on this anti-trust count, the court may not draw inferences that are "economically senseless." Eastman Kodak Co. v. Image Technical Services, Inc., ___ U.S. ___, ___, 112 S.Ct. 2072, 2083, 119 L.Ed.2d 265 (1992) (explaining Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

[5] The Seventh Circuit applies a two-part test to determine whether summary judgment is proper in an antitrust conspiracy case. First, the court must assess

whether the plaintiff's evidence of conspiracy is ambiguous. Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1171 (7th Cir. 1990). Evidence of a conspiracy will be considered ambiguous where the evidence "is ... as consistent with the defendants' permissible independent interests as with an illegal conspiracy." Id. If evidence is deemed ambiguous, the court must ask whether there is any evidence that "tends to exclude the possibility that the defendants were pursuing these independent interests." Id.

[6][7] In light of these principles, we agree with the Magistrate Judge's finding that the record does not support the existence of a conspiracy between Edison and Illinois Bell. As an initial matter, we reject the notice that a contractual division of authority automatically makes one party to the contract a co-conspirator in illegal activities undertaken by the other party. As the Magistrate Judge pointed out, "[u]nder plaintiff's argument, every delegation of contracting authority from principal to agent would give rise to antitrust liability, as the agency agreement necessarily gives the agent the power to impose terms and conditions on third parties." Report, at p. 12. Ehredt has cited no authority that supports this extreme position, and this proposition contradicts the express mandate of Monsanto that a "conscious commitment" must be made to the unlawful scheme. Monsanto, 465 U.S. at 764, 104 S.Ct. at 1471.

[8] Without Ehredt's theory of conspiracy through contract, we are left to examine the record for evidence that Illinois Bell and Edison conspired to require contractors to use union labor. As the Magistrate Judge noted, the only so-called evidence of agreement to use union labor is that both Edison and Illinois Bell use union labor. Applying the standard for summary judgment enunciated by the Seventh Circuit, it is clear that Ehredt cannot even reach the threshold of "ambiguous" evidence of a conspiracy, as there

is simply no evidence in the record suggesting Edison and Illinois Bell conspired, other than the similar union requirement. Where the defendant has come forward *806 with a sufficient legitimate business justification, evidence of parallel business behavior, absent more, cannot defeat a motion for summary judgment. American Floral Services, Inc. v. Florists' Transworld Delivery Ass'n, 633 F.Supp. 201, 211 (N.D. Ill. 1986). Here, Edison has explained that it requires its contractors to use unionized labor to improve internal relations. In the context of this case, this is sufficient to shift the burden back to Ehredt to produce "some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement." Weit v. Continental Illinois Nat'l Bank & Trust Co., 641 F.2d 457, 462 (7th Cir. 1981) (citing First National Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968); Modern Home Inst. Inc. v. Hartford Accident and Indemnity Co., 513 F.2d 102 (2d Cir. 1975)). We agree with the Magistrate Judge that Ehredt has not and cannot meet its burden.

Moreover, we note that a conspiracy between Edison and Illinois Bell to require contractors to use union labor makes no economic sense. From a financial standpoint, Edison and Illinois Bell would have an economic incentive not to use union labor because forcing contractors to use union labor would result in higher costs for the utilities. On the other hand, Edison's assertion that it uses union labor to improve internal labor relations is a feasible explanation. The compelling inference is that both Edison and Illinois Bell independently and legitimately arrived at their decisions to require union labor.

2. "Unilateral Conspiracy"

[9] Ehredt next objects to the Magistrate Judge's conclusion that the URD contract between Edison and Ehredt may not form the requisite Section One "agreement." Essentially, Ehredt contends that the contract amounts to an illegal agreement by two employers "fixing the wage at which one or both pay their employees." Plaintiff's Memorandum in Support of Objections, at p. 2. Ehredt argues that the URD contract provided that Ehredt must sign a collective bargaining agreement with a union, and in turn, the collective bargaining that he signed contained uniform wage provisions. Therefore, Ehredt contends, the existence of the collective bargaining condition in the URD contract defeats Edison's motion for summary judgment.

This novel position is not supported by any authority and is contrary to reason. As the Magistrate Judge correctly found, Edison's inclusion of the collective bargaining provision in its URD contracts was "for the legitimate and rational business purpose of maintaining a productive and agreeable relationship with its work force, which consisted primarily of union members." Report, at p. 17. By no rational interpretation can the collective bargaining provision be considered an illegal price-fixing condition. There is no reference whatsoever in the URD contract to an amount of wages Ehredt must pay his employees. Finally, as the Magistrate Judge observed, allowing a party to sue under the Sherman Act to recover damages "suffered as a result of another party's insistence on 'restrictive' terms in a contract.... would make every contract illegal, as all contracts place restraints and restrictions on the parties who enter them." Report, at p. 15.

In sum, Ehredt has presented no evidence from which this court could find that a conspiracy or unlawful agreement

existed between Edison and Illinois Bell or Edison and Ehredt. Thus, Ehredt's objections to the Magistrate Judge's recommendation on Count I are denied, and defendant's motion for summary judgment on Count I is granted.

3. Count II

Count II of Ehredt's Complaint alleges that Edison, Local 196, Local 336, the International, Trench-It and certain employees of Edison conspired to force Ehredt to contract with Local 196 for the purpose of forcing Ehredt out of the URD industry. Ehredt's theory of the case may be stated as follows. Certain Edison employees wanted Trench-It, and not Ehredt, to perform URD work for Edison because Trench-It provided kickbacks to the Edison employees and because seven Edison employees had family members employed by Trench-It. Edison, Edison employees, *807 Trench-It and Local 196 conspired to force Ehredt to breach its contract. Edison employees, Local 196, and Trench-It pressured the International President until he expelled Ehredt from Local 336. After the expulsion from Local 336, Edison railroaded Ehredt into signing a collective bargaining agreement with Local 196 that contained ruinous economic terms. The object of the conspiracy was achieved when Ehredt was forced to discontinue working for Edison, and Trench-It was awarded the URD contract.

The Magistrate Judge recommended that defendant's motion for summary judgment on Count II be denied. The Report concluded that the record supported the rational inference that a conspiracy existed between certain Edison employees, Trench-It and Local 196. The Magistrate Judge further found that this inference was economically rational and more persuasive than the inference that each of the parties was acting independently and in furtherance of legitimate business goals.

Edison objects to the Magistrate Judge's recommendation on several grounds. First, Edison contends that central to Ehredt's claim is the contention that Edison conspired with its own employees, and that an antitrust conspiracy may not be based on such a conspiracy. Second, defendants argue that the Magistrate Judge improperly relied on no more than allegations of the Complaint to support its inferences that Edison acted improperly. Edison argues that Ehredt must bring forth additional evidence of the conspiracy to survive a summary judgment motion. Finally, Edison asserts that the Magistrate Judge's Report is filled with factual errors that destroy the inferences upon which the Report relies to find a basis for an anticompetitive conspiracy.

Essentially, Edison's objections boil down to the core contention that Ehredt has not brought forth any evidence implicating Edison in the conspiracy, other than that regarding Edison employees whose conduct is not chargeable to Edison. Therefore, in order to thoroughly address Edison's objections, it is necessary to examine the specific evidence Ehredt avers and what rational inferences may be drawn from that evidence. [FN2]

> FN2. We will address the evidence with respect to allege co-conspirators Local 196, Edison, Edison employees and Trench-It. The record is devoid of any evidence implicating the International and Local 336 in the conspiracy.

(a) Local 196

[10] Ehredt alleges that Local 196 conspired with Edison and Trench-It to force Ehredt to enter into a collective bargaining agreement with Local 196 for the purpose of driving Ehredt out of business. The record

demonstrates that Local 196 complained to the International in January 1990 that Local 336 was representing employees that were in Local 196's jurisdiction. The record also states that two Ehredt employees suffered a beating at a remote worksite and that the assailants likely were associated with Local 196, especially in light of the solicitation on behalf of Local 196 moments after the attack. Ehredt also alleges that the business agent for Local 196 indicated to Ken Ehredt and Terry Counley that Ehredt was in the wrong union and that an Edison Board member was assisting Local 196 in getting rid of non-union contractors or getting them into Local 196.

Upon examination of this evidence, we find that the inference is unmistakable that Local 196 wanted Ehredt to affiliate with Local 196, and may have used coercive and abusive means to go about urging membership. The evidence, however, does not go beyond this inference. The only evidence connecting Local 196 to a concerted action with Edison and Trench-It is Eastwood's boasting abut his Edison connection [FN3] and the fact that Trench-It's president first complained to Eastwood about the jurisdictional question.

> FN3. We note, however, that although this evidence may evince a connection between Edison and Local 196, it does not show that Local 196 had any interest in forcing Ehredt out of business. In fact, Eastwood's statements could be more easily read to support the opposite proposition, because Eastwood stated that the Edison official was helping to get contractors into the union. Logically, a union does not recruit members only to effectuate their unemployment by its "ruinous" collective bargaining.

*808 Applying the standard enunciated in Market Force, the conspiracy is ambiguous at best. Substantial

evidentiary support exists in the record to infer that Local 196 was acting in its own, legitimate interest in obtaining Ehredt's membership into the union. On the other hand, there may be some evidence to indicate that Local 196 had some contact with either Trench-It or Edison in connection with the union jurisdiction dispute. Thus, drawing all reasonable inferences in favor of the plaintiff, it is possible, although remote, to say that ambiguous evidence of an antitrust conspiracy exists.

[11] Defendants, however, have rebutted the inference of Local 196's involvement in the conspiracy. It is economically senseless for Local 196 to go through all of the trouble questioning jurisdiction and harassing Ehredt into signing a collective bargaining agreement, only to watch the terms of the agreement force Ehredt out of business. Ehredt has identified no reason that would explain why Local 196 would undertake a campaign to recruit union members for the purpose of putting them out of work. In addition, Local 196 appears to have had a legitimate reason to contest Local 336's jurisdiction over Ehredt employees. See Market Force, Inc., 906 F.2d at 1171 (evidence tending to exclude the possibility of legitimate, independent interests is needed to support ambiguous conspiracy evidence). Local 196 contended that Local 336 was not chartered for the type of work being performed by Ehredt employees, specifically the setting of pad transformer, pedestal and switching gear. Thus, the only rational inference supported by the record is that representatives from Local 196 pressured Ehredt into signing a collective bargaining agreement because Local 196 wanted Ehredt's membership and jurisdiction over all URD workers in the area. [FN4] As such, plaintiff has offered no rational evidence to infer that Local 196 entered into an unlawful agreement in restraint of trade.

FN4. The record reveals that Local 196's campaign to recruit Ehredt was undertaken at the urging of Daniel Rosenmayer, president of Trench-It. This fact does not help Ehredt's case. As stated above, Trench-It's and Local 196's goals in pressuring Ehredt to switch unions were distinct. Trench-It wanted Ehredt to pay higher wages so it could compete with Ehredt for the URD contract, while Local 196 wanted Ehredt's membership. In order to find an antitrust conspiracy with a labor union based on a collective bargaining agreement, the goal between co-conspirators must be a common one. Mid-America Regional Bargaining Assn. v. Will County Carpenters Dist. Council, 675 F.2d 881, 889 (7th Cir. 1982).

(b) Trench-It

[12] Unlike the evidence surrounding Local 196, it is not difficult to infer from the evidence that Trench-It would like to have seen Ehredt put out of business. With respect to Trench-It, the record shows that Daniel Rosenmayer, the president of Trench-It, instigated the union jurisdiction dispute surrounding Ehredt's Local 336 affiliate. Moreover, Eastwood, Local 196's business manager, testified that Rosenmayer related to him that Trench-It lost the 1990 URD contract to Ehredt because of Local 336's lower wages. We agree with the Magistrate Judge's finding that "[i]t is difficult to imagine what legitimate business goals Rosenmayer could have had in initiating a union jurisdiction dispute over another company's employees—as president of a company, Rosenmayer's labor concerns should have extended no further than determining which union, if any, would represent his employees." Report, at p. 20.

This evidence, however, does not demonstrate an anti-trust violation. While Rosenmayer's tactics relating to the union jurisdiction dispute may not have been pristine, they cannot amount to a conspiracy in restraint of trade. The most that can be inferred from Rosenmayer's actions is that, with the intent to force Ehredt to repudiate its Edison contract, he contacted the unions to ensure that Local 336 was within its proper union-defined, jurisdictional boundaries. At this point, Rosenmayer had done nothing to violate the Sherman Act because no agreement was made between two entities to restrain trade. Subsequently, James Conway, International Vice President of the IBEW for its Sixth District, began a concerted effort to see that its jurisdictional restrictions were followed. At this point, still no actionable *809 conspiracy is shown to exist because no agreement or an unlawful purpose has been shown. Subsequently, after the jurisdictional plea was initially rejected, both Conway and Rosenmayer complaint vigorously to the International President to reverse himself and find that Local 336 had no jurisdiction over Ehredt's employees. On March 13, 1990, he, indeed, reversed his prior decision. He ultimately determined that Local 196 had jurisdiction over Ehredt's employees and that Local 336 did not and should refrain from entering into further collective bargaining agreements with Ehredt. Plaintiff does not allege that the ultimate decision regarding jurisdiction was made other than in good faith. As such, no agreement to achieve an unlawful purpose can be shown between Rosenmayer and/or Trench-It and the International. From all the evidence, the most that can be inferred is that Trench-It maliciously initiated a union jurisdiction dispute and that the union then, independently and lawfully, decided a union dispute through its intra-union procedures. We cannot conclude that a plaintiff demonstrates an antitrust violation by alleging that an entity participated in a union jurisdictional dispute regarding a competitor. As such, Ehredt's allegations do not amount to

an anti-trust conspiracy between Trench-It and the International.

(c) Edison

[13] Next, the Report concludes that Edison conspired to frustrate Ehredt's ability to compete with Trench-It through Edison's application of its union affiliation requirement. The Magistrate Judge noted that, at the outset of Edison's relationship with Ehredt, Edison required union affiliation, but not with any specific union. Later, Edison, through Daniel Shamblin, determined that the union must be AFL-CIO affiliated. Regarding this requirement, the Magistrate Judge found the following:

> This application of the [union-affiliation] policy, which was inconsistent with both the original union requirement and Edison's policy toward other contractors, is unsupported by any legitimate business justification. Therefore, the inference that the policy was applied to Ehredt for the purpose of finishing Ehredt off in the URD market must be seen as the exclusive inference.
>
> . . . . .
>
> The fact that the Local 196 requirement apparently ran counter to Edison's economic self-interest in the URD contract market strengthens the circumstantial evidence ... which suggests strongly that the policy was imposed as the coup de grace in a campaign organized by Edison, Trench-It and Local 196 to drive Ehredt out of the URD market.

Report, at pp. 27, 29. Edison objects to this characterization of its union requirement as an indicator of

Edison's anticompetitive objective. Edison asserts that any inference of conspiracy is refuted by other evidence in the record.

We agree with Edison and sustain its objection. Any negative inference drawn from Edison's union requirement is refuted by stipulated evidence in the record and the lack of economic rationale for Edison to conspire. Under the Market Force test, evidence of an antitrust agreement is considered ambiguous where the evidence "is ... as consistent with the defendant's permissible independent interests as with an illegal conspiracy." Market Force, Inc., 906 F.2d at 1171. It is far more likely that Edison refused the CIU for legitimate business reasons rather than as a calculated move designed to ultimately force Ehredt into breaching its contract.

First, as provided in the Statement of Uncontested Facts, Daniel Shamblin unilaterally made the decision to reject the CIU. His decision was based, as Ehredt has stipulated, on Shamblin's concern about work stoppages and difficulties with Edison's other unions. Final Pretrial Order—Uncontested Facts, ¶ 100. Shamblin made his decision without contacting or consulting anyone outside of Edison. Id. As such, Edison was acting independently when it made the decision to reject the CIU. We disagree with the Magistrate Judge's conclusion that the decision to reject a union not affiliated with the AFL-CIO was unsupported by an legitimate business *810 justification. Preserving internal relations is an acceptable business justification. [FN5]

> FN5. In addition, we disagree that Local 196 was the only acceptable union to Edison. The remarks made by Douglas Hill concerning the desirability of Local 196 over Local 150 is not necessarily indicative

> of Edison's decision whether Local 150 would be an acceptable union. Shamblin, not Hill, made decisions regarding union affiliation. Furthermore, Local 336 had been accepted by Edison. The union itself, not Edison, determined that Ehredt must be represented by Local 196.

Even assuming that Ehredt's evidence of Edison's involvement rose to the level of ambiguity, this court could not rationally find that Edison participated in the conspiracy because such participation would have been economically senseless. Conspiring to force out the low-bid contractor to replace it with a higher cost contractor is contrary to Edison's economic self-interest. We disagree with the Magistrate Judge's finding that the inference of Edison's involvement is strengthened because such a requirement is against Edison's self-interest. To the contrary, conduct not supported by any economic rationale is persuasive evidence against the finding of an antitrust conspiracy. See Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); Eastman Kodak Co., ___ U.S. at ___, 112 S.Ct. at 2083; Market Force, Inc. 906 F.2d at 1171.

The record also supports, overwhelmingly, the overall fairness and unbiased attitude of Edison towards Ehredt. First, despite Hill's apparent ill will towards Ehredt from as early as November 1988, Edison not only extended Ehredt's first contract, but it also accepted Ehredt's choice of unions—Local 336. Second, although Ehredt had ongoing concerns about neutrality of the bidding progress, the procedure ultimately was conducted in a fair manner, and Ehredt won its second contract. Finally, when Ken Ehredt expressed his concerns to Janet Rudolph, she affirmed Edison's commitment to "stand by" the URD contract.

Therefore, with respect to Edison's involvement as a public utility in the antitrust conspiracy, we disagree with the Magistrate Judge that the record supports an inference suggesting Edison acted with anticompetitive intent. This determination, however, does not fully answer the question of Edison's liability in the antitrust context.

(d) Edison Employees

[14] Although Edison argues that the conclusion that Edison was not involved in the alleged conspiracy should be the end of the argument, Ehredt maintains and the Magistrate Judge found that Edison employees participated in the conspiracy with Trench-It to oust Ehredt, and that Edison may be found liable under antitrust law for its employees' conduct. Before turning to the legal question of whether Edison can be found liable in an antitrust context for the actions of its employees, however, we turn to the record to determine if the inference that Edison employees conspired with Trench-It can be supported.

In particular, we agree with the Magistrate Judge's determination that the suspect behavior of Douglas Hill, the Edison supervisor, indicates that the wanted Trench-It and not Ehredt performing the URD contract. The evidence strongly suggests that Hill leaked Ehredt's bid strategy for the 1990 Crystal Lake District URD contract to Trench-It, as Trench-It's bid came in just below the figure Ken Ehredt had disclosed to Hill. Notably, when Ehredt won the contract after changing its bid strategy, Hill reacted by become furious and threatening Ehredt that he would give the contract to Trench-It if Ehredt made "any wrong move."

Second, after Ehredt began working for Edison under the 1990 URD contract, Hill continued his attempts to sabotage Ehredt. Hill made repeated threats to pull Ehredt

off the job, despite Ehredt's satisfactory performance. Ehredt's foreman, Terry Counley, testified that work assigned to Ehredt was diverted to Trench-It. When Ken Ehredt confronted Hill about the transfer of Ehredt's work to Trench-It, Hill retorted that "[i]t's none of your damn business what I do with this work." Report, at p. 24.

Other evidence also implicates Hill in wrongdoing. Ken Ehredt testified that he *811 approached Hill and Frank King, Edison's Crystal Lake District area foreman, about Edison's failure to pay Ehredt for completed work. King stated that Ehredt had "to pay the piper." Ehredt contends that this was a reference to paying kickbacks to Edison employees. In sum, we agree with the Magistrate Judge's conclusion:

> [E]ven if Hill's discussion with Ehredt concerning Ehredt's bid plans for the 1990 Crystal Lake Contract was held for the legitimate business reason of providing assistance to potential bidders, Hill's subsequent behavior—his prediction of Trench-It's winning the bid, repeated threats against Ehredt, transfer of work to Trench-It, and the reference to kickbacks made by one of his subordinates in his presence—gives rise to the unmistakable inference that Hill discussed bids for the purpose of leading bid information to Trench-It in order to deprive Ehredt of the opportunity to win a competitive bid. Such conduct is illegal per se under the Sherman Act. See United States v. W.F. Brinkley & Son Constr. Co., 783 F.2d 1157, 1161 (4th Cir. 1986).

Report, at pp. 25-26.

In addition, the actions of Hill and Trench-It, viewed together, raise a strong inference that Hill and Trench-It

acted in concert for the common goal of forcing Ehredt to breach its contract. While Hill used intimidation and provided Trench-It with confidential information, Trench-It apparently agreed to receive and utilize bid information and to receive work wrongfully diverted from Ehredt. Ehredt has asserted adequate evidence in the record to support an inference that Edison employees has an incentive to see Trench-It, rather than Ehredt, perform the URD contract, whether because of financial gain through kickbacks from Trench-It or a desire to further the interests of family members employed by Trench-It. This scenario is also consistent in a larger context: the actions of Hill and others are not consistent with Edison's economic interests, but are consistent with the interests of an employee whose own fortunes bear no immediate relation to the price paid by Edison for URD work. Thus, we find sufficient evidence from which to draw the inference that Hill and possibly other Edison employees [FN6] conspired with Trench-It to put Ehredt out of business.

> FN6. The record also indicates that Frank King, Edison's area foreman for the Crystal Lake District, was likely a participant in the conspiracy. In the presence of Douglas Hill, King told Ken Ehredt that he had to "pay the piper." Ehredt alleges that this statement intimated to him that he had to pay a kickback.

(e) Edison's Liability for its Employees' Actions

[15] Edison, however, strenuously urges this court that such a conspiracy—between Edison employees and Trench-It—cannot form the basis of an antitrust conspiracy involving Edison. Edison avers that Hill was acting outside the scope of his authority, and to the extent that he acted

unlawfully and in a manner injurious to Edison, Edison is not liable for his conduct. In contrast, the Magistrate Judge found that Hill was acting within the scope of his authority during the period in question, and was purporting to act on Edison's behalf. For these reasons, the Magistrate Judge found that Hill's actions could be charged to Edison. Report, at p. 26.

In American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982), the Supreme Court held that a corporation could be held liable in an antitrust action for actions undertaken by its agent under cloak of apparently authority. In ASME, a chairman of one of defendant's subcommittees issued an "unofficial response" condemning a competitor's product which ultimately led to the competitor's failure. This action by the corporation's agent was asserted as a basis for imposing antitrust liability on the defendant non-profit corporation. The Court found that the corporation had cloaked the subcommittee official with apparent authority, and "permit[ted] those agents to affect the destinies of businesses and thus g[ave] them the power to frustrate competition in the marketplace." Id. at 571, 102 S.Ct. at 1945. The Court defined apparent authority as "the power to affect the legal relations of another *812 person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." Id. at 566 n. 5, 102 S.Ct. at 1942 n. 5 (citing Restatement (Second) of Agency § 8 (1957)). The Court rejected the defendant's argument that it should not be held liable unless its agents acted with intent to benefit the corporation, and stated that "whether [the agents] act in part to benefit [the principal] or solely to benefit themselves or their employers, [the] agents can have the same anticompetitive effects on the marketplace." Id. at 572, 102 S.Ct. at 1946. The Court also found that the

defendant need not have ratified the agent's actions because imposing such a rule would allow a defendant corporation to avoid antitrust liability by ignoring its agents' conduct and would encourage corporations to do as little as possible to oversee its agents. Id. at 573, 102 S.Ct. at 1946.

Analogous cases have similarly concluded that employees who affect decision-making authority on behalf of the corporation possess apparent authority or represent the corporation's intent. See United States v. Basic Constr. Co., 711 F.2d 570 (4th Cir. 1983) (holding that a corporation will be held criminally responsible for antitrust violations committed by employees who acted with apparent authority and for the benefit of the corporation; corporate intent is shown by actions and statements of employees in positions of authority or have apparent authority to make policy decisions). In addition, the Seventh Circuit has found that, under ASME, "principals are liable when their agents act with apparent authority and commit torts even if the principal derives no benefit from the agent's actions and even if the agent acts entirely for this own purposes. "United States v. One Parcel of Land, 965 F.2d 311, 319 (7th Cir. 1992). According to that court, the relevant inquiry into apparent authority asks "whether to a third party the agent appears to be acting in the ordinary course of the business provided to him." One Parcel of Land, 965 F.2d at 319; but see Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129 (5th Cir. 1987) (refusing to hold defendant corporation responsible in antitrust for criminal acts of its employee which were outside of his authority).

We hold, therefore, that the allegations and evidence suffice to raise a genuine issue of material fact as to whether Hill acted with sufficient apparent authority in conspiring with Trench-It in order to hold Edison responsible for any anti-trust violations. Hill possessed authority to apportion

work between Ehredt and Trench-It. As such, Hill possessed authority to "affect the destinies of businesses and ... frustrate competition in the marketplace." See ASME, 456 U.S. at 571, 102 S.Ct. at 1945. The record demonstrates that an agreement may have existed between Hill and Trench-It to restrain trade. Furthermore, we hold that Ehredt may be able to show that Hill and other Edison employees were acting sufficiently within their apparent authority when diverting work to Trench-It and by-passing the competitive process to hold Edison, as principal, responsible under Section One of the Sherman Act. Edison's Motion for Summary Judgment on Count II is therefore denied insofar as the plaintiff alleges a conspiracy in restraint of trade between Edison and Trench-It. Plaintiff has alleged no other actionable conspiracy and, as such, all other allegations in Count II of agreements in restraint of trade are stricken.

4. Count IV

In Count IV, Ehredt alleges that Edison breached the 1990 Crystal Lake District URD contract. Ehredt sets forth two specific theories for the breach for which he seeks recovery. Ehredt first claims that Edison breached the URD contract when Hill diverted work to Trench-it. Second, Ehredt alleges that Edison breached the covenant of good faith and fair dealing by (1) refusing the CIU as an acceptable union replacement for Local 336 and (2) refusing to renegotiate the URD contract to reflect Ehredt's higher labor costs as a result of his agreement with Local 196.

(a) Ehredt's First Claim: Improper Diversion of Work

[16] The Magistrate Judge recommended granting Edison's motion for summary judgment on the first theory of recovery. The *813 Magistrate Judge found that Janet Rudolph's response to Ehredt that Edison would pay Ehredt for all URD work in the Crystal Lake District diverted to Trench-It in violation of the contract was dispositive evidence that Ehredt suffered no damages as a result of the alleged transfers of work to Trench-It. Report, at pp. 31-32. Ehredt objects to this conclusion, arguing that Rudolph's response demonstrates rather than relieves Edison's liability. Ehredt has produced Trench-It's paid invoices for work done during the contract period in the Crystal Lake District, and asserts that Edison has not paid him for his work.

We agree with Ehredt and sustain its objection. Ehredt has stated a valid claim under this theory and Rudolph's promise to pay for diverted work only strengthens Ehredt's case. In its brief, Edison stated that "Edison fulfilled its obligations under its contract with plaintiff by agreeing to pay for all work plaintiff was contractually entitled to perform." Edison's Motion for Summary Judgment On Count IV of the Complaint, ¶ 4 (emphasis added). We disagree. Edison will fulfill its obligations to Ehredt under the contract when it pays Ehredt for the work it was entitled to perform. Edison's contention that Rudolph's promise to fulfill Edison's contractual obligations entitles it to summary judgment is erroneous. Rudolph's promise to pay does nothing to alleviate the damages Ehredt has suffered as a result of the alleged breach of contract. Ehredt's objection to the Magistrate Judge's recommendation on the first claim of Count IV is sustained.

(b) Ehredt's Second Claim: Breach of Duty of Good Faith and Fair Dealing [FN7]

FN7. Edison states that "[i]t appears that the Magistrate Judge's Report is also intended to be a ruling on Edison's Motion in Limine ... to exclude legal theories." This is not the case; Edison's Motion in Limine was not decided by the Magistrate Judge and is still pending before the court.

The Magistrate Judge recommended granting summary judgment in favor of Edison on Ehredt's claim that Edison's failure to recognize the CIU breached the express terms of the URD contract. He recommended denying summary judgment on Ehredt's claim that the denial resulted in a breach of the covenant of good faith and fair dealing. Ehredt does not object to the Magistrate Judge's recommendation to grant summary judgment under the first theory of this claim. Therefore, this court accepts the recommendation as to the first theory of liability on Ehredt's second claim that Edison breached the URD contract by refusing to accept the CIU as an acceptable union.

With respect to the second part of this claim, the Magistrate Judge found that Edison had unilaterally changed its union requirement to include only those unions affiliated with AFL-CIO "to the discrete disadvantage of Ehredt." Report, at p. 34. Because Edison was vested with discretion to approve of Ehredt's suggested union, the Magistrate Judge found that a question existed as to whether Edison exercised its discretion reasonably and with proper motive. Report, at p. 34.

[17] Edison objects to the Magistrate Judge's recommendation, arguing that Edison's refusal of the CIU cannot possibly be considered in bad faith because Ehredt has stipulated in the Statement of Uncontested Facts that it was not. Paragraph 100 of this Statement states that

Shamblin, Edison's manager responsible for rejecting the CIU, rejected the CIU "because Edison faced considerable risk of work stoppages and difficulties with its own unions and from building trades unions if its contractors employed members of the CIU." Ehredt has also stipulated that Shamblin's decision was made without contacting anyone outside of Edison. Therefore, Edison claims, the decision to reject the CIU cannot have been made in bad faith.

Because the record contains no evidence whatsoever contradicting the above stipulations, we agree with Edison and sustain its objection as to this claim. Ehredt does not implicate Shamblin in any other way as involved in wrongdoing, and there is simply no evidence supporting the contention that he was motivated by something other than legitimate business concerns. Thus, viewing the evidence in the light most favorable to Ehredt, *814 we are unable to conclude that Edison's decision not to accept the CIU could have breached the covenant of good faith and fair dealing. This theory supporting the breach of contract claim is dismissed as having no basis in fact.

[18] The Magistrate Judge next recommended denying Edison's motion for summary judgment on Ehredt's claim that Edison breached the duty of good faith and fair dealing by refusing to renegotiate the 1990 Crystal Lake Contract following Ehredt's signing with Local 196. The Magistrate Judge found that although parties are not required to renegotiate contracts when circumstances change, the facts of the case warranted departure from this rule. The Magistrate Judge found that the change in circumstances--Ehredt's higher cost--was the result of a unilateral decision by Edison. The Magistrate Judge stated that "[i]f the covenant of good faith and fair dealing means anything at all, it means that a party cannot use its unilateral discretion to change the conditions underlying the contract and then

refuse to renegotiate the terms of the contract. That is precisely what appears to have occurred in this case...." Report, at p. 36.

[19] Edison objects to the Magistrate Judge's determination, stating that the law does not recognize any "good faith" duty to renegotiate because of a change in circumstances. We agree with Edison that Illinois law does not recognize a duty to renegotiate upon a change in circumstances. USX Corp. v. International Minerals & Chemicals Corp., 1987 WL 20427, *6, 1987 U.S. Dist. LEXIS 10914, *20 (N.D.Ill. 1987); see M.A.T.H., Inc. v. Housing Auth. of East St. Louis, 34 Ill.App.3d 884, 341 N.E.2d 51, 53 (5th Dist. 1976) (no duty to renegotiate housing contract pursuant to the Illinois Housing Authorities Act due to an alleged change of circumstances); cf. Bane v. Ferguson, 707 F.Supp. 988, 994 (N.D.Ill.) (finding that under Illinois law, duty of good faith and fair dealing does not apply in "overarching fashion, ... but rather ... limits one party's discretion where a contract gives the party that discretion"), aff'd, 890 F.2d 11 (7th Cir. 1989). Edison was not bound to renegotiate the contract. Edison's objection to the Magistrate Judge's recommendation on the third claim of Count IV is sustained. Defendant Edison's motion for summary judgment is granted with respect to plaintiff's claims in Count IV of breach of the duty of good faith and fair dealing.

CONCLUSION

For the reasons stated above, the findings of the Magistrate Judge's Report and Recommendation are accepted in part and rejected in part. The defendant's motion for summary judgment on Count I of Plaintiff's First Amended Verified Complaint is granted. Count I is dismissed with prejudice. Defendant's motion for summary judgment on

Count II is denied as to the allegations of an agreement in restraint of trade between Edison and Trench-It and granted as to all other allegations of conspiracy in restraint of trade. The defendant's motion for summary judgment on Count IV is denied as to Plaintiff's breach of contract claim and granted as to Plaintiff's breach of the covenant of good faith and fair dealing claim.

END OF DOCUMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Gerard C. Smetana
Law Offices of Gerard C. Smetana
333 West Wacker Drive
Suite 2860
Chicago, IL 60606-1227

DOCKETED
April 15, 1994

Case Number:	1:91-cv-02361
Title:	Ehredt Underground I v. Commonwealth Edison
Assigned Judge:	Honorable James H. Alesia

MINUTE ORDER of 4/12/94 by Hon. James H. Alesia : Enter memorandum opinion and order. Plaintiff's objections and defendant's objections to the Report and Recommendation of Magistrate judge Rosemond dated January 27, 1994 ("Report") are sustained in part and overruled in part. Defendant Commonwealth Edison's motion for summary judgment on Count I is granted. Motion for summary judgment on Count II is granted in part and denied in part and motion for summary judgment on Count IV is granted in part and denied in part. [90-1], [89-1], [88-1] Mailed notice

This order was entered on the docket by the Clerk April 13, 1994

ATTENTION:

This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated

by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

END OF DOCUMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EHREDT UNDERGROUND, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 91 C 2361
	)	
COMMONWEALTH EDISON COMPANY,	)	
	)	
Defendant.	)	

ORDER

POSNER, *Chief Circuit Judge*, sitting by designation. This case was assigned to me for trial, which was scheduled to begin on April 23 of this year but was canceled for reasons explained below. Judge Alesia, to whom the case had originally been assigned, considerably narrowed the issues by his pretrial rulings but had not yet addressed the principal antitrust issues, not having been asked to do so. At the final pretrial conference after the case was assigned to me I indicated that I would entertain a motion by the defendant for summary judgment on the antitrust counts, and asked both parties to file simultaneous memoranda concerning the viability of those counts. The memoranda have been filed--together with quite a number of further rounds of filings--and having read the various submissions I have decided to dismiss the antitrust counts because of the absence of any genuine issue of material fact concerning the defendant's antitrust liability (Fed. R. Civ. P. 56), relinquish my supplemental jurisdiction over the state-law counts (28 U.S.C. § 1367), quash the plaintiff's subpoenas (to which

objections have been made), deny all other pending motions, and enter final judgment for the defendant--with prejudice in the case of the antitrust counts, without prejudice in the case of the supplemental counts.

Construed as favorably to the plaintiff as the record permits, the facts constituting the antitrust claim are as follows. The plaintiff, Ehredt, was engaged in the business of digging trenches for underground cables (electrical, telephone, or cable-television) in McHenry County, Illinois. Its only customer was the defendant, Commonwealth Edison (Edison in fact had set Ehredt up in business), which supplies electrical energy to homes and offices in the county on a regulated-monopoly basis. Ehredt competed with other "trenchers," primarily Trench-It. Trench-It wanted to drive Ehredt out of business. (So it is alleged, and so I assume, without of course vouching for the truth of the allegation.) To that end, it enlisted aid both from a union and from certain disloyal employees of Edison, who as a result either of bribes from Trench-It or family connections with the owners or employees of Trench-It caused Edison to withdraw business from Ehredt, leading to Ehredt's collapse and this lawsuit.

The plaintiff describes the antitrust violation of which it complains as a "group boycott" that violates section 1 of the Sherman Act per se, which is to say without proof of any actual effect on competition. What is true, or at least may be assumed to be true for purposes of this decision, is that when competitors get together and with the aid of a customer or supplier cut off the supply or demand of one of their competitors they commit a per se violation of section 1. That is not what happened here. Only one competitor of Ehredt, the victim, is involved--Trench-It. There is no boycotting group, no aggressive cartel of competitors. Yet if Trench-It were, or rather would be but for Ehredt, a monopolist, then enlisting Ehredt's sole customer (Edison) in a scheme to cut off and destroy Ehredt and thus achieve

monopoly power would be a form of monopolizing, in violation of section 2 of the Sherman Act. It could also be charged as a violation of section 1, because it would involve concerted action between Trench-It and Edison (with the union an additional conspirator--but that does not affect the analysis) aimed at achieving monopoly. It is the rare section 2 violation that does not also violate section 1.

To determine whether Trench-It had or could realistically aspire to monopoly power by conspiring with Edison to cut off Ehredt requires consideration of the structure of the relevant market, contended by the plaintiff to be the digging of trenches for Edison in McHenry County. Edison lays cables for Illinois Bell as well as for itself, and apparently no other company lays either electrical or telephone cables in the county; we shall give the plaintiff the benefit of the doubt and ignore cable-television cables. The test for the existence of a relevant market, that is a market relevant to appraising the existence of market or monopoly power, is the alternatives (to the alleged monopolist) that customers in the market have for supplying their needs. Those suppliers, which may be actual or potential (that is, may be selling to those customers at the moment or would do so if price rose slightly) constitute the relevant market. There is only one customer, Edison. We must consider that Edison could do if Trench-It, having become the sole "trencher" in the county by destroying Ehredt, tried to exploit its position by raising its prices for digging trenches above the competitive level. What alternatives would be open to Edison? What would it do? The answer is obvious. Edison would dig the trenches itself. It is only recently that Edison began contracting out the trenching function to independent contractors such as Ehredt and Trench-It--both of which Edison set up in business. Even if Edison did not have the capability of digging its own trenches, which plainly it does have, it would not be at the mercy of Trench-It. Many contractors throughout the State of Illinois, not to

mention the rest of the United States, are capable of digging trenches for the laying of underground electrical and telephone cables. Their crews and equipment are portable, and can be moved into McHenry County easily in response to the signal emitted by supracompetitive pricing. Stated otherwise, there is no evidence that Ehredt is a significant enough factor in the trenching market, properly defined with due regard to economic reality, for its elimination to have any effect on the price or output of trenching services.

There is, in short, an utter failure of proof of a relevant market. Without such proof there is no basis for supposing that Trench-It has any actual or potential market power. And without such power its efforts to destroy a competitor, however unethically, do not state a claim for relief under federal antitrust law. I assume without having to decide that Edison has power in the market for the purchase of cable trenching, but on the plaintiff's own showing that power was used to harm the wielder of the power, Edison itself, by eliminating one of its suppliers. This underscores the fact that Edison like Ehredt was a victim (of Trench-It, the union, and its own employees) rather than an aggressor. But the more important point is that, with no evidence that eliminating Ehredt reduced competition--the competitive effect of eliminating it cannot be gauged without establishing a relevant market--Edison's market power has no significance.

This is a classic business-tort case, in which commercial bribery and other tortious conduct is employed by one competitor (Trench-It) to drive out another. Such a tort assumes antitrust significance only if the actual or probable consequence is to reduce competition, rather than merely eliminate a single competitor who may well have no measurable significance to the preservation of competition. Of that consequence there is not a shred of evidence, although the case is four years old and discovery has been completed. I do not see that I have any alternative but to

dismiss the antitrust counts. By dismissing the supplemental counts without prejudice, I allow Ehredt to pursue the claims in those counts in state court.

Against the reasoning sketched above, which I had furnished the parties when I invited the filing of memoranda concerning the antitrust issues that remained after Judge Alesia's rulings, Ehredt argues primarily as follows. First, rather than the relevant market being trench-digging of all kinds throughout the region, Ehredt says the relevant market is just utility trenching in the "Crystal Lake District," one of five districts into which Edison has divided its "Northern Division." Edison pays different prices for trenching in different parts of the Chicago area, and Ehredt contends that each place where Edison charges a different price is a separate market. These price differentials are said to be inconsistent with a competitive market, in which prices either are uniform or are, at least, clearly cost-based, for example because as the bidders get farther away from the work sites they incur increased transportation costs.

But there are many possible reasons, having nothing to do with monopoly, why Edison pays more for trenching in one county than in another. Services in general are not priced identically throughout northern Illinois, a diverse and populous region; why should trenching services be expected to be? There is no evidence of price differences in these services that are so arbitrary as to imply the practice of price discrimination, which is a symptom of monopoly power. The basic question, remember, is whether trenching would become more expensive to a significant group of customers if Ehredt were eliminated. To answer that question one would have to know whether other trenchers (or Edison itself) could come in and fill whatever void Ehredt leaves behind. What those trenchers are able to charge elsewhere is not relevant. What is relevant is their ability to do the work that Ehredt does, at a comparable price.

Defending its narrow construal of the geographical dimension of the market, Ehredt argues that it is impractical for anybody outside of McHenry County to dig trenches there for Edison. Ehredt says, and I accept for the purpose of considering Edison's motion for summary judgment, that Edison requires its trenchers to work no more than eight hours a day yet also requires them to perform services that take five to six hours, so that as a practical matter its utility trenching must be done by trenchers who live near the work sites and therefore will not have to spend too much time commuting to them. But this just means that trenchers from other areas cannot be counted on to commute to McHenry County on a daily basis to compete for the business created by Ehredt's elimination. So what? No reason is given to doubt that one or more of these out-of-county trenchers could relocate to McHenry County once Ehredt was gone (destroyed by Trench-It) and prices went up. Or could rent some motel rooms. In short there is no evidence that a trencher from elsewhere could not set up shop in McHenry County to fill whatever void Ehredt's exit created. Ehredt argues that Edison has created a barrier to entry into the market for digging utility trenches by requiring that its trenchers be unionized and by refusing to deal with trenchers like Ehredt who use cheap labor from a nonpreferred union. And they say that utility trenching requires a company to make "significant financial investment in equipment and supplies," which makes it an unattractive field for a company to enter. Really? Every trencher in the country has already made the investment. The issue, on which Ehredt casts no light, is the *incremental* investment of serving McHenry County. As for the union requirement, it applies to all trenchers, current and prospective. It confers no comparative advantage on the entrenched trencher.

Ehredt argues that Edison cannot be relied upon to dig its trenches itself, rather than pay supracompetitive prices for the service, and therefore should be excluded from

the market. The reason is that Edison capitalizes its trenching costs--so it *wants* them to be high. Ehredt believes that Edison is using its trenching as a tax shelter; it suggests that Edison thus is "tacitly promoting" higher labor rates for the trenching it buys. But this is no reason to doubt Edison's ability to do its own trenching. If it really wants to overpay for trenching, it can do the work itself and pay its workers too much, which is what Ehredt says Edison sometimes does now anyway. Ehredt's argument shows how remote this case is from anything to do with antitrust law.

Since Edison is not only a buyer but also a provider of trenching services, just like Ehredt and Trench-It. Edison sells trenching services to the phone company under an arrangement between Edison and Illinois bell to share the trenching work that both require. Ehredt claims to have been menacing Edison by undercutting the prices that Edison was able to charge to the phone company--prices Edison charged either by having Trench-It do the work as its agent or by doing the work itself, in either case at artificially high rates. Edison and Trench-It were trying to drive Ehredt and its favorite union out of business to keep their own labor rates up in order to justify the high prices to the phone company.

This tale is too implausible to support an antitrust claim. If successful in preventing Ehredt from underpricing it by paying lower wages, Edison would be able to maintain its existing price to the phone company but it would also have to pay more to the phone company when it was the phone company's turn to do the trenching. Edison wasn't just working for Bell; they were taking turns doing the work for each other. since they were sharing the work, how would they benefit from overcharging? They would be overcharging each other. And Edison, by keeping wages up, would be hurting itself on any trenching that it did for itself or that Trench-It did for it. We know from the *Matsushita* decision that an antitrust claim which makes no sense as a

mater of economics or business practice is properly dismissed on summary judgment.

When all the federal claims in a case drop out before trial, the usual course is to dismiss the remaining claims without prejudice, so that the plaintiff can pursue them in state court. Ehredt has asked me to retain jurisdiction over its state law claims, invoking the familiar exception for cases in which there already has been a heavy investment of judicial time which would be wasted if the parties start from scratch in state court. This case is not a compelling candidate for applying the exception. I have not in fact familiarized myself with any of Ehredt's state law claims and am reluctant to conduct a trial between Illinois residents of issues solely of Illinois law. Such a trial belongs in an Illinois court. There is no reason to doubt that the parties can use any discovery materials they have obtained in this litigation in the state court, without having to duplicate any of the discovery proceedings that have taken place in this court.

Ehredt has a final request. It is that if I dismiss its *remaining* state claims without prejudice, I also vacate Judge Alesia's earlier dismissal of its *other* state claims so that Ehredt can litigate all its state claims from scratch in state court. Ehredt is worried that some of Judge Alesia's findings on the dismissed counts will have collateral estoppel effect on the remaining counts in state court. The doctrine of the law of the case prevents me from revisiting Judge Alesia's rulings in the absence of several established exceptions, none of which is argued to apply here. What weight if any to give those rulings in a refiled proceeding in state court is for the Illinois state courts to decide. Ehredt's remaining state law claims will be dismissed without prejudice.

Richard A. Posner
Chief Circuit Judge
(sitting by designation)

August 7, 1995

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
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Office of the Clerk

Thomas M. Triplett
Schwabe, Williamson & Wyatt
1211 Southwest 5th Avenue
1600-1800 Pacwest Center
Portland, OR 97204

Case Number:	1:91-cv-02361
Title:	Ehredt Underground I v. Commonwealth Edison
Assigned Judge:	Honorable James H. Alesia

MINUTE ORDER of 9/11/95 by Hon. Richard A. Posner: Plaintiff's motion to correct judgment pursuant to Rule 60(a) FRCP is denied. [254-1] Plaintiff's motion to extend time for filing notice of appeal and State Law claims under supplementary jurisdiction is granted. [254-1] The time is extended to and including 09/18/95. Mailed notice

This docket entry was made by the Clerk on September 12, 1995

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

CORRECTED JUDGMENT IN A CIVIL CASE

Ehredt Underground, Inc.

v. CASE NUMBER: 91 C 2361

Commonwealth Edison
Company, et al.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that on August 8, 1991 on plaintiff's oral motion, defendant International Brotherhood of Electrical Workers, AFL-CIO was dismissed with prejudice and without costs as a party defendant. (Judge Alesia)

On August 8, 1991, plaintiff and defendant Local 336's joint motion to dismiss said defendant was granted. Defendant International Brotherhood of Electrical Workers Local Union No. 336 was dismissed with prejudice and without costs as a party defendant. (Judge Alesia)

On July 16, 1993, defendant Local No. 196's motion to dismiss was granted in part and denied in part. Count III of plaintiff's First Amended Complaint was dismissed. (Judge Alesia)

On April 12, 1994, defendant Commonwealth Edison Company's motions for summary judgment on Count I was granted; for summary judgment on Count II was granted in part and denied in part; for summary judgment on Count IV was granted in part and denied in part. (Judge Alesia)

April 28, 1994, defendant Local No. 196's motion to settle order was granted. Defendant International Brotherhood of Electrical Workers, Local No. 196 was dismissed from this case. (Judge Alesia)

On August 7, 1995, final judgment is entered for defendant, Commonwealth Edison Company, and the suit is dismissed with prejudice on the antitrust claims and without prejudice on the remaining supplemental state law claims. (Chief Circuit Judge Posner)

August 21, 1995

H. Stuart Cunningham, Clerk

Carol L. Wino

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U.S.C.A. CONST. AMEND. VII.

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

15 U.S.C.A. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, Pub.L. 101-588, § 4(a), 104 Stat. 2880.)

15 U.S.C.A. § 15

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found as an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rules, statute, or court order providing for sanctions for

dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state shall be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act,

that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

(As amended Sept. 12, 1980, Pub.L. 96-349, § 4(a)(1), 94 Stat. 1156; Dec. 29, 1982, Pub.L. 97-393, 96 Stat. 1964.)

28 U.S.C.A. § 1367

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental

jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of

Puerto Rico, and any territory or possession of the United States.

(Added Pub.L. 101-650, Title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

29 U.S.C.A. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

29 U.S.C.A. § 158

§ 158.

(a) Unfair labor practices

It shall be unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such

membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initial fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 195(a) of this title.

(b) Unfair labor practices by labor organizations

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor

organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), of the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petitioner under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) **Expression of views without threat of reprisal or force or promise of benefit.**

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) **Obligation to bargain collectively.**

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and

conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for each employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) **Enforceability of contract or agreement to boycott any other employer; exception**

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an

employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such

employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further,* That any agreement which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

(As amended July 26, 1974, Pub.L. 93-360, § 1(c)-(e), 88 Stat. 395, 396.)